84-825

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHWEST AIRLINES, INC.

Petitioner,

v.

MARY P. LAFFEY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Should the Court resolve the split in the circuits over whether discriminatory intent is the ultimate issue in "equal-pay-for-equal-work" cases under the Equal Pay Act and Title VII of the Civil Rights Act of 1964, as interpreted in *County of Washington v. Gunther*, 452 U.S. 161 (1981); and if so, did the court below again disregard this Court's test for "disparate treatment" by holding that "discriminatory motive or animus" was "not even relevant" here?

2. In calculating the award of backpay on "equal-pay-for-equal-work" claims under Title VII of the Civil Rights Act, are the courts required to apply the "upward equalization" provision of the Equal Pay Act rather than the measure that this Court has held applies in Title VII cases: the difference between the actual wage rate paid and the rate that would have been paid in the absence of the alleged discrimination?

3. Should the Court resolve the conflict among the circuits over the proper test for determining when a violation of the Fair Labor Standards Act, including the Equal Pay Act, is "willful," a question closely related to the "willfulness" issue under the Age Discrimination in Employment Act now before the Court in *TWA v. Thurston*, No. 83-997?

4. In determining whether an employer need not pay double damages under the Fair Labor Standards Act because he acted in "good faith' and with "reasonable grounds" in concluding that an employment practice was lawful, is it completely irrelevant as a matter of law that the practice had industry-wide acceptance and was approved in *bona fide* collective bargaining agreements?

CORPORATE LISTING STATEMENT

Petitioner Northwest Airlines, Inc. is a wholly-owned subsidiary of NWA, Inc. Northwest Airlines, Inc. holds through a wholly-owned subsidiary twenty-five percent (25%) of the shares of Gatwick Handling Limited. Northwest Airlines, Inc. has no other affiliates. All other subsidiaries of Northwest Airlines, Inc. and NWA, Inc. are wholly owned.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Northwest Airlines, Inc., defendant in the district court, was the appellant/cross-appellee in the court of appeals.

The plaintiffs in the district court were the appellees/cross-appellants in the court of appeals. The named plaintiffs are:

Mary Pat Laffey
M. Louise Ayres
Diane B. Backovich
Nancy J. Bates
Goldie K. Chun
Rhea Dow
Beverly A. Emge
Susan F. Gerde
Mary Patricia Gleeson
Dona M. Hall
Viona S. Hamilton
Peggy M. Helme
Judi Jochimsen
Celestine Johnson
Katherine T. Keane
Suzanne P. Dress
Margaret J. Laffey
Abby Lanman
Shirley Linburgh
Barbara E. Manrow
Alice C. McCabe
Patricia McFarland
Mary C. Moxness
Myrna Lee Olson
Janet M. Pegg
Susan M. Pupera
Carol Raschke
Angelica H. Renner
Virginia Rose
Marygale Rosenberg
Rosemary M. Ruff
Mary Ann Schaak
Georgia Simpson
Alta Mae Smith
Iris Lynn Smith
Janet P. Smith
Jimene K. Smith
Elizabeth Stewart
Gayle Sturgis
Connie Walker

The above named plaintiffs have acted as class representatives for two subclasses of plaintiffs, an "Equal Pay Act class," consisting of approximately 960 women who filed consents with the district court, and a "Title VII class," consisting of other present or former Northwest female cabin attendants who did not elect to be excluded from this lawsuit.

The Equal Employment Opportunity Commission and the Secretary of Labor of the United States participated as *amici curiae* at earlier stages of the proceedings in the court of appeals.

Air Line Pilots Association, a non-aligned party below, and Transport Workers Union participated in earlier stages of the proceedings in the court of appeals.

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MARY P. LAFFEY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Northwest Airlines, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 20, 1984.

OPINIONS BELOW

The pertinent opinions of the court of appeals are the opinion on the appeal from the final judgment, 740 F.2d 1071 (1984) ("*Laffey III*"), and the opinion on an interlocutory appeal, 567 F.2d 429 (1976) ("*Laffey I*"), *cert. denied*, 424 U.S. 1096 (1978).[1] The pertinent opinions of the district

[1] Three other opinions by the court of appeals are not directly pertinent: 587 F.2d 1223 (1978), denying taxation of costs; 642 F.2d 578 (1980) ("*Laffey II*"), concerning modification of certain injunctive provisions; and the opinion of September 28, 1984 (D.C. Cir. No. 83-1838), not yet reported, reversing the award of attorney's fees to plaintiffs' counsel.

court are reported at 366 F. Supp. 763 (1973), *as amended by* 8 EPD ¶ 9528 (1974) (findings and conclusions); 374 F. Supp. 1382 (1974) (denying liquidated damages; entering remedial order); 16 EPD ¶ 8317 (1978) (remedial issues); 481 F. Supp. 199 (1979) (backpay issues); 24 EPD ¶ 31,384 (1980) (awarding liquidated damages). Copies of these opinions and of relevant unpublished orders are reprinted in a separate Appendix ("App.").

JURISDICTION

The judgment of the court of appeals (App. 289a) was entered on July 20, 1984. A timely petition for rehearing was denied on August 28, 1984 (App. 291a). The Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1). In reviewing appeals from final judgments, the Court regularly has "consider[ed] questions raised on the first [interlocutory] appeal, as well as 'those that were before the Court of Appeals upon the second appeal.'" *Mercer v. Theriot*, 377 U.S. 152, 153-54 (1964); *see, e.g., Spaziano v. Florida*, 104 S. Ct. 3154 (1984); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977); *Falk v. Brennan*, 414 U.S. 190 (1973); *Hughes Tool Co. v. TWA*, 409 U.S. 363 (1973).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Equal Pay Act of 1963, 29 U.S.C. § 206(d); the Fair Labor Standards Act, 29 U.S.C. §§ 216(b), 251(a), 251(b), 255(a), 260; and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, 2000e-5(g), are set forth in the separate Appendix to this Petition (App. Q).

STATEMENT

1. **Introduction.** This case involves a backpay award to about 3,300 women. With interest, the award totals approximately $60 million. It may be the largest judgment ever

rendered under the Equal Pay Act or Title VII of the Civil Rights Act. Under the decision below, Northwest Airlines must retroactively pay *all* stewardesses the higher wages previously established by collective bargaining for only seven percent of its cabin attendants, who were believed to be performing substantially more demanding jobs. Ironically, as a result of the rulings below, stewardesses would receive retroactive awards that would pay them substantially *more* than hundreds of their male counterparts received for performing the same work.

Until January 1976, Northwest employed two classifications of cabin attendants, "pursers" (most of whom were men) and basic cabin attendants (men and women). Pursers were assigned primarily to international flights and had supervisory authority over all other cabin attendants. They were paid 20% to 50% more in base pay than other cabin attendants. App. 166a-167a, 211a, 215a; *Laffey III* R. 144 App. B. Only about 150 of Northwest's cabin attendants were pursers. The rest, as many as 2,000 men and women at one time, occupied the basic cabin attendant position. Most basic cabin attendants were stewardesses, but beginning in 1949 and continuing with minor interruptions through the backpay period (1968-1978), Northwest also employed a significant number of men in the basic cabin attendant job. As the trial judge found, those men performed "the same duties as stewardesses" and were "compensated at the same rate." App. 169a; *see* App. 166a, 167a; *Laffey III* R. 144 App. A. The wage levels for all cabin attendants were established and adjusted regularly in collective bargaining with unions in which the stewardesses "always have and still do possess a clear numerical superiority . . ." App. 165a.

Until the late 1960's, only men were eligible to be promoted to purser. In 1970, a group of stewardesses brought this case, alleging that the former ineligibility of women to be promoted to fill the occasional purser vacancies

violated Title VII of the Civil Rights Act. They also alleged that *all* stewardesses, in any event, were entitled to the same pay as pursers because the jobs were "equal" within the meaning of the Equal Pay Act. Northwest does not challenge the claim that the pre-1970 exclusion from *promotional* eligibility violated Title VII. What Northwest does challenge is the holding that the *pay differential* between pursers and basic cabin attendants constituted discrimination "on the basis of sex," despite the trial judge's finding that the differential reflected Northwest's actual understanding that the purser position was materially different from the basic cabin attendant position and merited higher pay than earned by the women *and men* in the basic job.

2. **The Purser Position.** The position of "flight purser," which had its genesis in the maritime tradition, was first established in 1947, when Northwest began international flights. App. 163a, 166a-167a; *Laffey I* Jt. App. 343. Northwest's creation of this position followed the lead of the two established international carriers, Pan American and TWA. *See Maguire v. TWA*, 535 F. Supp. 1283, 1288 (S.D.N.Y. 1982), *aff'd mem.*, 722 F.2d 728 (2d Cir. 1983) (holding that TWA's copying of Pan Am's purser position indicated that the pay differential was job-related, not sex-based, even though TWA hired only male pursers).

Like the traditional pursers on ocean-going passenger vessels, Northwest's pursers were regarded as junior officers charged with overall supervisory responsibility for assuring passenger comfort and well-being. The job definition contained in every collective bargaining agreement provided that pursers "may be designated as being in charge of other cabin attendants." App. 166a-167a. The definition of the roles of the basic cabin attendants did not include any supervisory responsibilities. App. 166a, 167a; *Laffey I* Jt. App. 2563. Reflecting this settled understanding shared by Northwest and its cabin attendants, North-

west's "Cabin Service Manual," the basic rulebook for all cabin attendants, established a chain of command in which a purser, regardless of seniority, was automatically in overall charge of all basic cabin attendants on the flight. App. 208a.

On any Northwest flight to which a single purser was assigned, the purser *always* exercised overall supervisory responsibility over all *other* cabin attendants. The trial judge found that the supervisory cabin attendant exercised real and continuing responsibilities for directing workload and functions, that they were "subject to discipline if they fail to carry out their 'supervisory' responsibilities," and that they were held "accountable" for failing to carry out these responsibilities. App. 209a.

On domestic passenger flights, which did not carry pursers, the basic cabin attendant with seniority would have to assume some supervisory responsibilities, but a stewardess (or her male counterpart) *never* supervised a purser. App. 208a. Moreover, as the trial judge found, the cabin attendant who assumed a temporary supervisory role was, unlike a purser, "accountable only for the conduct of service in that section of the aircraft in which he or she works. ..." App. 208a. Since cabin attendants bid for flights on the basis of seniority, the cabin attendants on a particular flight tended to be of roughly equal seniority. As a result, the identity of the senior stewardess on a particular flight was a matter of chance. Trial Tr. 848-51, 874, 938-39, 1275-76. In addition, since more than 90% of Northwest cabin attendants were non-pursers, a particular cabin attendant in the basic job only had random and sporadic opportunities to supervise, and could only supervise his or her peers.

3. **The Determination of Job Equality.** Northwest acknowledged below that the custom of restricting purser positions to men was inconsistent with Title VII. That

practice was changed by a 1967 amendment to the collective bargaining contract, and a number of stewardesses were actually promoted to the higher paying job while the case was pending in the trial court. The plaintiffs, nevertheless, pressed the trial judge to rule that the job to which stewardesses had been ineligible for *promotion* was actually "equal" in "skill, effort and responsibility," within the meaning of the Equal Pay Act, to the job they all already held.

The courts below ruled that they could justifiably overlook the district judge's findings that the pursers' supervisory responsibilities had real content, because the trial judge had made a separate finding that the pursers' supervisory functions "require no greater skill, effort or responsibility, *than the other functions* assigned to all cabin attendants." App. 210a-211a (emphasis added). The courts, relying on that comparison of the various job components, concluded that the jobs here were "substantially equal" because the similarities outweighed the differences. Since most pursers (though not all) were men, the trial judge decided that the vast majority of basic cabin attendants—all except the *men* in that job—were entitled automatically to the higher pay that had been regularly negotiated in collective bargaining as appropriate only for the relatively small number of pursers.

4. **Motive for the Purser Pay Differential.** The district judge never made a finding of fact that Northwest paid pursers more than other cabin attendants *because* they were men. Rather, the judge's findings established that Northwest paid pursers more because of a well-settled understanding, reflected in *bona fide* negotiated labor agreements, that pursers held a different, more responsible position. For instance, the trial judge found that, even though he had concluded that the jobs were "in fact equal," Northwest had actually "believed otherwise," and "it was not unreasonable" to do so. App. 220a. Foreclosing any claim that the Company's explanation was merely "pretextual," the judge further found that Northwest believed

in "good faith" that it was not violating the Equal Pay Act by paying different wages for the two jobs and that there was no "intentional, bad faith, attempt to evade the law." *Id.; see also* App. 180a-181a.

On remand after *Laffey I*, the judge also found that Northwest's labor relations counsel and personnel officials had specifically reviewed the pay differential in light of the passage of the Equal Pay Act and Title VII and had "concluded that the jobs of purser and stewardess were *in fact* different." App. 253a (emphasis in original). The judge found that Northwest, on the basis of subsequent opinions of outside counsel and an independent personnel consultant, "adhered to its belief that the purser and stewardess positions were different throughout the litigation." *Id.* The court of appeals has never suggested that any of those findings was clearly erroneous.

Both the district judge and the court of appeals, however, held that motive is legally irrelevant solely because plaintiffs showed that the jobs were "substantially equal" as an objective matter and that most of the people in the higher paid job were men. *See* App. 103a. In *Laffey III*, the court of appeals added that, because women in the past had been excluded from *promotion* to purser, the absence of any "discriminatory motive" in setting wage rates was "not even relevant" in determining whether the pay differential itself also violated both Title VII and the Equal Pay Act. App. 14a-15a.

5. **The Measure of Title VII Backpay.** During the backpay calculation proceedings on remand following *Laffey I*, Northwest tendered evidence that, if the Company had realized that the jobs of purser and basic cabin attendant were legally "equal," it would have merged the classifications and set the pay scale for the merged classification lower than the premium pay that the small group of pursers had been thought to merit. That is in fact what happened in 1976 in the first collective bargaining agreement

negotiated after the district court's decision. Northwest offered evidence showing that the pay levels at other major airlines with only a single classification of cabin attendant were substantially below the purser rate paid by Northwest. *Laffey III* J.R.E. 139-53. The district court summarily rejected that evidence in the belief that the measure of backpay under Title VII must be the full pay differential, because that is the measure of recovery expressly specified in the Equal Pay Act. App. 247a, 239a. The court of appeals affirmed. App. 29a-34a.

6. **"Willfulness."** The courts below also found the Equal Pay Act violation "willful," thus establishing the backpay period as three years rather than two. *See* 29 U.S.C. § 255(a). Although Company officials had concluded that the differential was lawful, the court of appeals in *Laffey I* decided that an employer's violation of the Act is "willful" whenever he "is cognizant of an appreciable possibility that he may be subject to the statutory requirements" and he "consciously and voluntarily charts a course which turns out to be wrong." App. 122a-123a. The court adhered to this test in *Laffey III*. App. 28a.

7. **Liquidated Damages.** The trial judge initially found that Northwest had acted in "good faith" and with "reasonable grounds" in concluding that the pay differential comported with the Equal Pay Act and, thus, that statutory double damages ("liquidated damages") were not warranted. *See* 29 U.S.C. §§ 216(b), 260. The "reasonable grounds" for the Company's assessment were found to be:

> "the traditional practice of the Company in treating the positions as unequal, the general industry practice to the same effect, the acquiescence of the stewardesses' bargaining representative in this arrangement, the absence of any grievances or even suggestions from stewardesses to the contrary prior to the present controversy, and the absence of any clear legal precedent or guideline precisely in point." App. 220a-221a.

In *Laffey I*, however, the court of appeals rejected as legally irrelevant all the factors cited by the district court except legal uncertainty. In addition, the court created a new test for subjective "good faith": the "legal uncertainty ... must pervade and markedly influence the employer's belief; merely that the law is uncertain does not suffice." App. 132a.

On remand, the district judge found that Northwest's personnel officials and labor relations counsel had actually reviewed the job classifications in light of the Equal Pay Act and Title VII and had actually concluded that the jobs were in fact different and could be compensated at different levels. Nevertheless, the judge ruled that Northwest officials had not gone far enough in their analysis to satisfy *Laffey I*'s restrictive standard of "good faith" and "reasonable grounds." Accordingly, the judge believed that he had to assess double damages on the Equal Pay Act claims. App. 255a-256a. In *Laffey III*, the court of appeals affirmed. App. 46a.

REASONS FOR GRANTING THE WRIT

In *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981), this Court held that, even if it would be "unfair to require" Northwest "to pay the entire judgment" in this case, Northwest had no statutory claim for "contribution" against the unions who joined in fashioning and evaluating the purser/stewardess pay differential and who, indeed, successfully demanded that Northwest maintain and even enlarge the differential after this suit was filed. The issue now confronting the Court is whether the backpay judgment itself rests on legally erroneous premises.

I. THE RELEVANCE OF INTENT

Under the Equal Pay Act an employer is forbidden to "discriminate ... on the basis of sex" in paying for equal work, but is not liable for a wage differential "based on any

other factor other than sex." 29 U.S.C. § 206(d)(1)(iv). The "Bennett Amendment" to Title VII, 42 U.S.C. § 2000e-2(h), applies this defense to Title VII cases. The court below ruled that this defense permits an employer only to rely on an "objective standard," such as a formal job evaluation, to justify the conclusion that jobs deserve different pay. The court held that an employer's actual motivation in paying different wages is irrelevant. That ruling conflicts with this Court's decision in *County of Washington v. Gunther*, 452 U.S. 161 (1981). The ruling below also conflicts with decisions of other courts of appeals.

A. The "Bennett Amendment" to Title VII provides that any employment practice "authorized" under the Equal Pay Act is also lawful under Title VII. This Court in *Gunther* rejected the argument that, because of the Bennett Amendment, Title VII covers sex discrimination claims involving wages only when the jobs are "equal" and, thus, when the differential could also be attacked under the Equal Pay Act. In response to the dissent's contention that this construction would render the Bennett Amendment "mere surplusage," the Court explained that incorporation into Title VII of the fourth Equal Pay Act "defense"—which provides a defense to an employer who relied on a "factor other than sex"—was "significant" for another reason. The Amendment "clarified that the standards of the Equal Pay Act would govern even those wage discrimination cases where only Title VII would otherwise apply." 452 U.S. at 175. The Court left no doubt that the effect of this limitation was to confine claims alleging unequal pay for equal work to cases of *intentional* discrimination:

> "Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing 'not only overt discrimination but also practices that are fair in form, but discriminatory in operation.' *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act, however,

> was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination." 452 U.S. at 170.

In *Griggs*, the Court had held that, in some cases under Title VII, a plaintiff can prevail by showing "disparate impact," without showing an actual intent to discriminate. The Court's ruling in *Gunther*—that the Equal Pay Act's fourth defense precludes the use of the *Griggs* "disparate impact" standard—means that, in equal pay cases, discriminatory intent is the ultimate issue. The Court expressly stated that the purpose of the sex-discrimination statutes was to outlaw discimination against women "because of their sex" and thus to combat "disparate treatment of men and women." 452 U.S. at 180. The Court in *Gunther* expressly anticipated that its reading of the importance of the "factor other than sex" provision would "affect the outcome" of some "sex-based wage discrimination cases . . ." *Id.* at 175 n.14. The reason is that when "disparate treatment" —discriminatory intent—is at issue, the ultimate question is the employer's "actual motive." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 (1982).

At least two circuits have recognized that, in light of *Gunther*, discriminatory intent is the ultimate issue in any equal pay case. For example, in *Maxwell v. City of Tucson*, 34 EPD ¶ 34,518 (9th Cir. 1984), the Ninth Circuit ruled that any showing that the employer relied on some purpose other than sex in establishing a pay differential would establish the "factor other than sex" defense. Judge Merrill, resting on *Gunther* and the legislative history of the Equal Pay Act, concluded in a concurring opinion that, when an employer invokes the "factor other than sex" provision to justify payment of a wage differential, it "is, then, with the motivation that prompted that action that we are concerned." 34 EPD at 34,290. Judge Merrill explained that this provision was "designed to permit employers to defend wage differentials on the showing that such differentials are not

predicated on sex discrimination." *Id.* Similarly, in *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1137 (5th Cir. 1983), the court held that a "classic equal pay claim" under the Equal Pay Act and Title VII is a "disparate treatment suit" in which the ultimate inquiry is whether "a discriminatory reason more likely motivated the employer" in paying the differential. Several commentators also have observed that *Gunther* establishes intent as an essential element in equal pay cases.[2]

By contrast, the Tenth Circuit recently held in *Sinclair v. Automobile Club of Oklahoma*, 733 F.2d 726, 729 (10th Cir. 1984), without discussing *Gunther*, that "[d]iscriminatory intent is not an element of a claim" under the Equal Pay Act. More importantly, the court below decided that, despite *Gunther*, the employer's intent is irrelevant in an equal pay case. Instead, the court decided that the "factor other than sex" defense encompasses only a "sex-neutral, objective standard" such as an "objective job rating system." App. 12a. Although in *Corning Glass Works v. Brennan*, 417 U.S. 188, 200-01 (1974), this Court held that a differential resulting from a unilateral job evaluation system is

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[2] *See, e.g.*, Gould, *The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. Col. L. Rev. 1, 66 (1981) ("The critical thrust of Justice Brennan's opinion was that the *Griggs* theory of liability, *i.e.*, no intent necessary for a violation, could not be used in sex-based wage discrimination cases under either Title VII or the Equal Pay Act."); Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837, 846 (1982) (same); Powers & Cooper, *Validity of Comparable Worth Left Open By "Gunther"*, Legal Times of Washington, June 15, 1981, at 15, 18 (referring to "subtle indications in the opinion that intent is a critical and necessary element of any Title VII claim that alleges discrimination in compensation"). *See also* Note, *Gender-Based Wage Discrimination and the Bennett Amendment: County of Washington v. Gunther*, 1982 B.Y.U. L. Rev. 401, 407-12 (arguing in favor of permitting disparate-impact wage claims while recognizing that *Gunther* "suggests that the impact theory will not be available to plaintiffs in gender-based wage discrimination litigation").

automatically permissible under the Act—because Congress was only seeking to attack "wage differences based on sex alone"—the Court never suggested that a differential that emerges from bilateral, *bona fide* collective bargaining and that corresponds with the employer's own actual assessment of job differences should have *less* protection. Moreover, as the court below recognized, other courts, including the Fifth Circuit in *Plemer*, have not limited the "factor other than sex" defense to "objective" job evaluation systems. App. 12a n.8. *See, e.g., Campbell v. Von Hoffman Press, Inc.*, 632 F.2d 69 (8th Cir. 1980); *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589 (3d Cir.), *cert. denied*, 414 U.S. 866 (1973).[3]

B. The court below also held that, if *Gunther* does require a showing of discriminatory intent—"disparate treatment"—in equal pay cases, plaintiffs would still recover. This conclusion rests on the theory that the existence of "sex-segregated job classifications and unequal pay for equal work" automatically creates "equal pay" liability,

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[3] The court below also refused to follow *Gunther* on the ground that an intent requirement would not be "synchronous" (App. 10a) with the provision in the Fair Labor Standards Act (of which the Equal Pay Act is a part) that grants a court discretion to waive double damages if the employer shows that he acted "in good faith" and had "reasonable grounds for believing" that no violation occurred. 29 U.S.C. § 260. That provision, however, was enacted in 1947, sixteen years before the Equal Pay Act, in order to relieve employers from the doubling of liability for unanticipated violations of the minimum wage and maximum hour provisions of the FLSA, a statute that imposes liability without regard to intent. The equal pay bill had been debated as a free-standing anti-discrimination measure. In the final stages of congressional consideration of the bill in 1963, Congress tucked it into the FLSA, which the Labor Department administered, for the sole purpose of neutralizing objections that enforcement of the new law would otherwise have led to creation of a "new bureaucracy" and a "new set of investigators." 109 Cong. Rec. 7223, 9193 (1963) (remarks of Reps. Thompson and Bolton). There was no hint that the 1947 amendment dealing with relief from double damages would somehow control the standards for equal pay liability under the new anti-discrimination statute.

regardless of the employer's reason for establishing the pay differential. In these circumstances, according to the court,

> "an employer's 'discriminatory motive,' ... far from ranking as an 'essential element of a plaintiff's claim ... is not even relevant ..." App. 14a-15a n.12.

This Court, however, has (1) "consistently distinguished disparate-treatment cases from cases involving ... disparate impact ...," *United States Postal Service v. Aikens*, 460 U.S. 711, 713 n.1 (1983), (2) repeatedly emphasized that a disparate treatment claim turns on actual discriminatory intent, *Connecticut v. Teal*, 457 U.S. 440, 446 (1982); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977), (3) reiterated that discriminatory intent means "actual motive" and "is not a legal presumption to be drawn from a factual showing of something less than actual motive," *Pullman-Standard*, 456 U.S. at 290, and (4) determined that a finding in a disparate treatment case that some nondiscriminatory policy actually motivated an employment practice precludes liability, *N.Y. City Transit Authority v. Beazer*, 440 U.S. 568, 579, 587 (1979). Just last Term the Court vacated another decision of the court below because of its refusal to interpret properly the intent requirement, and pointedly reminded that court that the critical factual inquiry in any disparate treatment case "is whether the defendant intentionally discriminated" against the plaintiffs by "treating some people less favorably than others because of their ... sex ...." *Aikens*, 460 U.S. at 715.

Here, the trial judge found that Northwest did not pay different wages to its employees because of their sex, but because it actually believed, on the basis of assessments by personnel officials and labor relations counsel, that, as supervisors who were principally assigned to international flights, they were performing different jobs. App. 220a-221a. Indeed, throughout virtually all of the period when pursers were receiving higher pay, Northwest was paying other

male cabin attendants exactly the same wages as it paid to stewardesses for performing what it believed to be the same work. If the purser wage differential was not *actually motivated* by sex discrimination, it is beside the point that the pay scale had a different impact on men and women because most basic cabin attendants were women and most (or all) pursers were men, even if that result was "foreseeable." *See Personnel Administrator v. Feeney*, 442 U.S. 256, 278 (1979).

The court of appeals erroneously took the intent involved in Northwest's pre-1970 *promotional* policy and imputed it to the distinct "equal-pay-for-equal-work" claim. The extravagant result of this confusion is that, instead of awarding backpay to the 100 or so women whose senority would have entitled them to promotion to purser, the courts below effectively "promoted" all 3,300 class members to the purser position by awarding all of them full retroactive pay at the purser level. In the face of factual findings concerning the actual reasons for creating and maintaining the pay differential, however, that approach impermissibly treated the "basis" for the differential as "a legal presumption" which the courts should not have "drawn from a factual showing of something less than actual motive." *Pullman-Standard*, 456 U.S. at 296.[4] The court below has muddled the standards governing cases under two important federal statutes.

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[4] The issue in *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 103 S. Ct. 3492 (1983), and *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), on which the court below relied, was whether there is a Title VII violation when an employer explicitly bases a wage differential on sex but the sex-based decision does not reflect any specific "animus" toward women. The Court there held that, where there *is* a deliberate intent to *base* a differential on sex, nothing further need be shown. Here, by contrast, as the trial judge found, sex was not the employer's reason for distinguishing the pay levels negotiated for the two jobs.

II. MEASURE OF BACKPAY UNDER TITLE VII

The courts below ordered Northwest to pay each member of the Title VII class (which includes more than 2000 stewardesses who are not eligible to recover under the Equal Pay Act) the full difference between what she actually earned as a stewardess and what she would have earned if she had been paid as a purser. Neither court, however, considered it relevant to ascertain what stewardesses would have earned if there had been no separation of cabin attendants into two classifications. Instead, they believed they were *required* to apply the "upward equalization" formula set forth in the Equal Pay Act, 29 U.S.C. § 206(d), in fashioning a backpay remedy under Title VII:

> "'Equalization upward' to the rate of pay for males is the remedy prescribed in the Equal Pay Act, and is the remedy under Title VII as well . . . where the statutes overlap." App. 248a; *see also* App. 239a; 133a; 30a-33a.

This Court, however, repeatedly has emphasized that backpay under Title VII is an equitable remedy and that, in fashioning relief under Title VII, courts must undertake to make the victims of discrimination "whole," but not more than whole. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Courts must "recreate the conditions and relationships that would have been had there been no unlawful discrimination," *Teamsters*, 431 U.S. at 372, and may not "catapult [plaintiffs] into a better position than they would have enjoyed in the absence of discrimination," *Ford Motor Co. v. EEOC*, 458 U.S. 219, 234 (1982). Contrary to the rulings below, this Court already has treated these principles as applying with full force to an equal pay claim brought under Title VII. In *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978), a Title VII case involving an equal pay violation, the lower courts had awarded backpay in the full amount of a differential in pension contributions required from men and women, so that the take-home pay of the

women would be retroactively "equalized upward" to the level received by men. This Court held that no backpay award at all was equitably proper, but added—in what the court below here deprecated as mere "guardedly worded *dicta*" (App. 32a):

> "[T]he [lower] court's decision to award the full difference between the contributions made by male employees and those made by female employees . . . may give the victims of the discrimination more than their due. If an undifferentiated actuarial table had been employed in 1972, the contributions of women employees would no doubt have been lower than they were, but they would not have been as low as the contributions actually made by men in that period. The District Court should at least have considered ordering a refund of only the difference between contributions made by women and the contributions they would have made under an actuarially sound and nondiscriminatory plan." 435 U.S. at 719 n.36.

The decision below conflicts with this principle. As a result, Northwest must pay to the vast majority of its cabin attendants (but not to male basic cabin attendants) the premium paid to its small group of pursers in the belief that the jobs were different and merited different compensation. Northwest's evidence, however, which plaintiffs did not rebut, showed that if Northwest had understood that the jobs were legally "equal," there would have been a combined job classification and a single wage scale in line with the wages paid by other major airlines that had only a single class of cabin attendants, all of which paid wages below Northwest's purser pay level.

Other courts have recognized that automatic "equalization upward" is not necessarily the proper remedy in an equal pay case under Title VII. For example, in *Love v. Pullman Co.*, 569 F.2d 1074 (10th Cir. 1978), a Title VII case involving the payment of unequal wages to employees in all-black and all-white job classifications performing "essentially" the same work, the court declined to award

the full difference between the actual earnings of the two classifications, and instead based backpay on the "average wage" that would have been paid "[h]ad the two job classifications . . . been combined . . ." 569 F.2d at 1076-77. The court held that its approach—which closely parallels the approach proposed by Northwest in this case—was the proper way to "restore those discriminated against to a position as nearly as is now possible to that they would have attained had there been no discrimination." *Id.* at 1076.[5]

In adopting a different approach, the courts below simply engrafted the Equal Pay Act's backpay formula onto the equitable backpay remedy created in Title VII, even though there is nothing in either the language or the legislative history of Title VII suggesting that Congress intended that result. Indeed, this Court has recognized that the two statutes provide different remedial schemes and has noted specifically that the Equal Pay Act affords plaintiffs advantages not available under Title VII, such as entitlement to *enhanced* backpay relief. *See Gunther*, 452 U.S. at 175 n.14. If Congress had chosen to make the Equal Pay Act formula govern the Title VII remedy in "equal pay" cases involving alleged sex discrimination, it could have incorporated the "upward equalization" provision into Title VII. Instead, in adopting the Bennett Amendment, Congress decided only to incorporate the substantive defenses of the Equal Pay Act, but not its backpay formula.

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[5] In addition to *Love*, a number of other courts have upheld the use of "averaging" techniques and similar formulae as the most equitably sensitive way to fashion Title VII backpay. *See, e.g., Ingram v. Madison Square Garden Center, Inc.*, 709 F.2d 807 (2d Cir.), *cert. denied*, 104 S. Ct. 346 (1983); *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 400-01 (3d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *United States v. United States Steel Corp.*, 520 F.2d 1043, 1056 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); *Sabala v. Western Gillette, Inc.*, 516 F.2d 1251, 1264-65 (5th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977).

This Court should decide, therefore, whether the decision below misconceives the proper standards for fashioning backpay awards for wage discrimination claims under Title VII.

III. PROPER TEST FOR "WILLFUL VIOLATION"

The Fair Labor Standards Act, of which the Equal Pay Act is a part, generally limits the backpay recovery period to two years before commencement of the suit. Congress provided, however, that backpay may be recovered for three years if there was a "willful violation." 29 U.S.C. § 255(a). The court below held that an employer commits a "willful violation" simply when he is "cognizant of an appreciable possibility that he may be subject" to the Act and deliberately pursues a course "which turns out to be wrong." App. 122a-123a. Under this standard, not even negligence is necessary to establish a "willful violation."

A. The circuits have adopted different interpretations of the "willful violation" standard. As the court below recognized, "[c]ourts ... have usually subscribed to one or the other of two divergent views," with some "requiring nothing more than knowledge of the possible applicability of the governing statute to the conduct eventually held to be legally wanting," and others requiring that "violations of the Act be deliberate, voluntary and intentional." App. 115a-116a (comparing cases) (footnotes omitted). The court below nevertheless declined to follow either of those standards and instead adopted still a third approach. App. 121a-123a.[6]

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[6] The statutory language indicates that recovery for three years was intended to be the exception, not the rule, and to be available only when the employer intended to violate the law. *See* 29 U.S.C. § 255(a) (recovery limited to two years "except" in a case "arising out of a willful violation"). But it is only the rarest of employers who is not cognizant of at least the existence of the FLSA. The standard adopted by the court below, therefore, automatically subjects virtually all employers to an

(footnote continued on next page)

Certiorari should be granted to resolve this confusion among the circuits. The issue is an important one affecting the administration of the FLSA. Over the last several years, about 1,500 cases under the FLSA have been filed each year in federal court. *Annual Reports of the Director of the Administrative Office of the United States Courts* (1978-1983). The permissible length of the backpay recovery period in these cases turns on the interpretation of the "willful violation" provision of the FLSA.

B. A closely related question is before the Court in *TWA v. Thurston*, No. 83-997, which was argued on October 9, 1984. That case involves the proper standard for determining when there has been a "willful violation" of the Age Discrimination in Employment Act, a finding that permits the award of double damages, 29 U.S.C. § 626(b). There is a related circuit conflict over that interpretation. *Compare Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020, n.27 (1st Cir. 1979), *with Wehr v. Burroughs Corp.*, 619 F.2d 276, 283 (3d Cir. 1980). The Age Discrimination Act, however, also incorporates from the FLSA the same "willful violation"

(footnote 6 continued)

extra year of liability. Indeed, a recent survey of decisions interpreting § 255 discovered that courts which have adopted a standard similar to the one adopted below have found violations "willful" in all but one case. Note, *Standards of Willfulness Under the Fair Labor Standards Act*, 78 Mich. L. Rev. 626, 632 (1980).

The extreme to which some courts have gone in imposing the supposedly "exceptional" extra year of liability is illustrated by decisions in the Fifth Circuit. *Compare Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972) (counsel's advice that employer was in compliance demonstrated awareness of Act and, hence, willfulness) *with Brennan v. Heard*, 491 F.2d 1 (5th Cir. 1974) (employer's decision not to seek legal counsel not a defense to liability for a willful violation). The Fifth Circuit's seminal *Jiffy June* decision acknowledged that every prior decision construing § 255 had awarded an extra year of backpay only upon a showing that the employer consciously violated the law. Recently, two judges in the Fifth Circuit expressly acknowledged that *Jiffy June* was wrongly decided. *Hill v. J. C. Penny Co.*, 688 F.2d 370, 376 (5th Cir. 1982) (concurring opinion of Gee & Clark, JJ.)

provision at issue in this case to govern the backpay recovery period in age discrimination cases. *See* 29 U.S.C. § 626(e)(1). As the Solicitor General noted in the EEOC's brief in *Thurston* (at 33), there is a "strong presumption that Congress intended that the term" have the same meaning in both contexts. *See Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932). Thus, it is likely that this Court's interpretation of the double-damage standard under the Age Discrimination Act also will govern the standard fixing the backpay recovery period, which both the Age Discrimination Act and the Equal Pay Act borrow from the FLSA.

Therefore, the Court should not attempt to resolve the issue under the Age Discrimination Act in *Thurston* without also considering the meaning of the same language in the FLSA. The legislative history of the 1966 amendment to the FLSA, which added the "willful violation" provision at issue here, is necessary to an understanding of Congress' intent in both adopting and incorporating the "willful violation" standard in the Age Discrimination Act the following year. *See, e.g., Oscar Meyer & Co. v. Evans*, 441 U.S. 750, 753-756 (1979). At oral argument in *Thurston*, counsel for the government argued that the legislative purpose underlying the FLSA's "willfulness" provision should be controlling in construing the same phrase in the Age Discrimination Act. Yet, none of the briefs submitted in *Thurston* even alludes to the relevance of the legislative history of that 1966 amendment to the FLSA. As the first comprehensive study of the extensive legislative history relating to the 1966 "willfulness" amendment demonstrates, Congress intended that a "violation" would be "willful" only if the employer consciously disregarded the requirements of the law. *See* Note, *Standards of Willfulness Under the Fair Labor Standards Act*, 78 Mich. L. Rev. 626 (1980).

Moreover, the parties in *Thurston* briefed only how different interpretations of the standard for double damages under the Age Discrimination Act could influence enforcement of that Act. But identical language in the FLSA governs the backpay period under the FLSA, the Equal Pay Act, and the Age Discrimination Act. Since the Court's decision in *Thurston* will affect the enforcement of those other statutes, the Court should have before it full briefing on the policies of those other provisions when it construes the "willful violation" language in § 626(b) of the Age Discrimination Act.[7]

C. The standard for a "willful violation" adopted by the court below is inconsistent with either standard proposed by the parties in *Thurston*. Although TWA in that case is arguing that a violation is "willful" only if the employer specifically intends to violate the Act, the Solicitor General is proposing that a violation should be treated as "willful" "whenever the employer intentionally discriminates on the basis of age and is, or should have been, aware of the applicability of the ADEA" to his conduct. EEOC Br. at 36. The test applied by the court below under the Equal Pay Act, however, is even more expansive than that proposed by the Solicitor General, because the court below expressly dispensed with any need to find that Northwest "intentionally discriminated on the basis of" sex in paying the differential. Either outcome in *Thurston*, therefore, will establish that the court below erred in adopting a standard under which intent to discriminate on the basis of sex is treated as

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[7] Moreover, under the Age Discrimination Act the "willful violation" standard governs both the backpay period and the availability of double damages, but under the FLSA the availability of double damages turns on whether the employer acted in "good faith" and with "reasonable grounds" for believing the employment practice was lawful. The relationship between these apparently distinct standards is important in arriving at a sound construction of "willful violation" that preserves the coherence of this interrelated statutory scheme, but the parties do not address this problem in *Thurston*.

irrelevant in determining whether any "violation" was "willful." Thus, the judgment below, at a minimum, will have to be vacated to the extent that it rests on a different standard of "willfulness."

IV. STANDARDS FOR "LIQUIDATED DAMAGES"

Under the Fair Labor Standards Act, which includes the Equal Pay Act, a plaintiff who establishes liability may recover not only backpay but also "an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). The statute further provides, however, that the trial judge may decline to award double damages if the employer acted "in good faith" and with "reasonable grounds" for believing that his actions were lawful. 29 U.S.C. § 260.

In *Laffey I*, the court of appeals reversed the trial judge and ruled that "traditional practice of the Company," "general industry practice to the same effect," "the acquiescence of the stewardess' bargaining representative in this arrangement," and "the absence of any grievances or even suggestions from stewardesses to the contrary" are legally irrelevant in determining whether Northwest had "reasonable grounds" for its belief that the pay differential between pursers and stewardesses was permissible under the Act. App. 127a. On remand the district judge read *Laffey I* as holding that those four factors also could not be considered "to support the finding of good faith." App. 252a. In *Laffey III*, the court of appeals upheld this broad reading of *Laffey I*. App. 46a. The holding of the court below that those four factors are not legally relevant to either an employer's good faith or the reasonableness of his belief is in conflict with other decisions and is inconsistent with the express terms of the FLSA.

Many other courts have concluded that an employer had a reasonable, good faith belief in the lawfulness of an

employment practice based on (1) the employer's traditional practice, *see, e.g., EEOC v. Kendon of Dallas, Inc.*, 34 EPD ¶ 34,393 at 33,398 (E.D. Tex. 1984); *Conwell v. Central Mo. Telephone Co.*, 76 F. Supp. 398, 406 (W.D. Mo.), *aff'd*, 170 F.2d 641 (8th Cir. 1948); (2) industry custom, *see, e.g., Kimball v. Goodyear Tire & Rubber Co.*, 504 F. Supp. 544, 549 (E.D. Tex. 1980); *Bailey v. Pilots' Ass'n*, 406 F. Supp. 1302, 1308 (E.D. Pa. 1976); or (3) a collective bargaining agreement, *see, e.g. Addison v. Huron Stevedoring Corp.*, 96 F. Supp. 142, 167 (S.D.N.Y. 1950), *aff'd on this point but rev'd in part on other grounds*, 204 F.2d 88, 93 (2d Cir.), *cert. denied*, 346 U.S. 877 (1953); *Ahearn v. Holmes Electric Protective Co.*, 110 F. Supp. 822, 827 (S.D.N.Y. 1953). So far as we are aware, no other court has ruled that these factors must be categorically excluded in applying § 260. *See generally* 26 A.L.R. Fed. 648-54 (1976 & 1984 Supp).[8]

It is not surprising that other courts have often relied on the four factors held irrelevant below. Congress adopted § 260 as one of the 1947 portal-to-portal amendments to the FLSA in order to eliminate the harshness of a liquidated damages provision that had been construed as mandatory even when the employer had made a *bona fide* mistake. The congressional findings and declaration of policy, which are set forth in the statute itself, provide that the purpose of the amendments was to avoid "wholly unexpected liabilities, immense in amount and retroactive in operation" resulting from judicial decisions overriding "long-established *customs, practices,* and *contracts* between employers and employees." 29 U.S.C. §251(a) (emphasis added). In addition, the amendments were specifically designed to "protect

[8] Courts have adopted varying positions on the relevance of employee acquiescence in the challenged wage practice. *Compare Landaas v. Canister Co.*, 188 F.2d 768, 772 (3d Cir. 1951) (absence of employee complaints relevant), *with Martinez v. Food City, Inc.* 658 F.2d 369, 376 (5th Cir. 1981) (absence of employee complaints irrelevant, citing *Laffey I*).

the right of collective bargaining." 29 U.S.C. § 251(b)(2). Yet, the court below held that the trial judge erred as a matter of law in even considering these very factors.[9]

The court of appeals' single-minded focus on "legal uncertainty" frustrates the broader, stated purposes of the ameliorative amendment and establishes a standard that would be virtually impossible for any employer to satisfy. Entitlement to liquidated damages is a question that arises in every one of the thousands of cases filed under the FLSA, but this Court has never addressed the standards set out in § 260 by which an employer may be relieved of liability for the additional damages. The Court should grant certiorari to make the interpretation of § 260 in the District of Columbia Circuit consistent with the interpretations followed in the other circuits and with the express language of the Fair Labor Standards Act.

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[9] After remand, the district judge ruled that, without being able to rely on the four excluded factors as bearing on Northwest's "good faith," the Company could not show that it had done enough to demonstrate "good faith" legal uncertainty. The court rested on Northwest's failure to commission a formal job evaluation and its reliance on legal advice from in-house (as opposed to outside) counsel. App. 253a. But Congress specifically decided that an employer should not be required to conduct a job evaluation to establish that two jobs are different, 109 Cong. Rec. 9198, 9203 (1963) (remarks of Rep. Goodell and Rep. Griffin), and hardly could have intended to subject an employer to double damages whenever a formal evaluation was not performed. Moreover, other courts have held that advice of outside counsel is not a prerequisite to good faith. *See, e.g., Van Dyke v. Bluefield Gas Co.*, 210 F.2d 620, 622 (4th Cir.), *cert. denied*, 347 U.S. 1014 (1954); *see also General Electric Co. v. Porter*, 208 F.2d 805, 817 (9th Cir. 1953), *cert. denied*, 347 U.S. 951 (1954); *cf. Lave v. M'S Pub, Inc.* 435 F. Supp. 917 (D. Neb. 1977) (employer's reliance on accountant's advice sufficient to demonstrate good faith).

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

MARY P. LAFFEY, *et al.*,

Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINION OF THE COURT OF APPEALS IN *"LAFFEY III"*

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1033

MARY PAT LAFFEY, et al.

v.

NORTHWEST AIRLINES, INC., APPELLANT

AIR LINE PILOTS ASSOCIATION, NON-ALIGNED PARTY

No. 83-1034

MARY PAT LAFFEY, et al., APPELLANTS

v.

NORTHWEST AIRLINES, INC.

AIR LINE PILOTS ASSOCIATION, NON-ALIGNED PARTY

No. 83-1167

MARY PAT LAFFEY, et al.

v.

NORTHWEST AIRLINES, INC., APPELLANT

AIR LINE PILOTS ASSOCIATION, NON-ALIGNED PARTY

No. 83-1168

MARY PAT LAFFEY, et al., APPELLANTS

v.

NORTHWEST AIRLINES, INC.
AIR LINE PILOTS ASSOCIATION, NON-ALIGNED PARTY

Appeals from the United States District Court
for the District of Columbia

(Civil Action No. 70-2111)

Argued December 8, 1983

Decided July 20, 1984

Phillip A. Lacovara, with whom *William R. Stein* was on the brief for Northwest Airlines, Inc., appellant in Nos. 83-1033 and 83-1167 and appellee in Nos. 83-1034 and 83-1168.

Michael H. Gottesman, with whom *Robert M. Weinberg* and *Jeremiah A. Collins* were on the brief for Laffey, et al., appellees in Nos. 83-1033 and 83-1167 and appellants in Nos. 83-1034 and 83-1168. *Julia Penny Clark* also entered an appearance for Laffey, et al.

Before: GINSBURG, BORK and STARR, *Circuit Judges*.

Opinion Per Curiam

PER CURIAM: This Equal Pay Act-Title VII class action concerns the former practices of Northwest Airlines (NWA) with regard to the employment of cabin attendants. Women employed by NWA in the all-female category "stewar[illegible] received less pay than men in the all-

male "purser" category. In addition, NWA required female cabin attendants to share double rooms on layovers while providing single rooms to male cabin attendants; it paid male attendants, but not females, a cleaning allowance for uniforms; and it imposed weight restrictions upon females only.[1]

The lawsuit challenging these practices commenced in the summer of 1970 and has been intensely litigated since its inception. District court adjudications were twice appealed at interlocutory stages; in response, panels of this court meticulously reviewed an extensive record. On November 30, 1982, the district court concluded all tasks within its charge and entered final judgment. NWA appealed and plaintiffs cross-appealed.

We affirm the challenged rulings in principal part. On the few points on which we do not uphold the district court's determinations, we specify, precisely, the required modification so that adjustments to the final judgment can be calculated without further adversarial contest. Our opinion thus serves as the court's closing chapter in this nearly fourteen-year-old controversy.

I. Background

A. *Prior Proceedings*

Trial of plaintiffs' multiple charges of NWA violations of the Equal Pay Act, 29 U.S.C. § 206(d) (1982), and Title VII of the Civil Rights Act of 1964, 42 U.S.C.

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[1] The practices cited in text were the predicate for monetary relief. Several other challenged practices were redressed solely by injunctive relief: restricting "purser" jobs to men alone; permitting male cabin attendants, but not females, to wear eyeglasses; permitting male attendants, but not females, to carry luggage of their own choice aboard flights; imposing flight arrangements under which male attendants, without regard to length of service, ranked as superior to female attendants aboard a plane; maintaining a shorter maximum height requirement for female cabin attendants than for males.

§ 2000e to 2000e-17 (1976 & Supp. V 1981) (Title VII), commenced in late 1972 and concluded in early 1973. In November 1973 findings and conclusions, *Laffey v. Northwest Airlines, Inc.*, 366 F.Supp. 763 (D.D.C. 1973) [hereafter, *1973 Findings*], the district court determined that NWA had violated the law in each of the respects alleged in the complaint. Of dominant importance to the monetary relief awarded plaintiffs, the district court found that stewardesses and men serving as pursers performed substantially equal work. The purser/stewardess salary differential, the less desirable layover accommodations for women, and the cleaning allowance limited to men, were held impermissible under both the Equal Pay Act and Title VII; the weight limits for women were declared unlawful under Title VII. In an April 1974 remedial order, *Laffey v. Northwest Airlines, Inc.*, 374 F.Supp. 1382 (D.D.C. 1974) [hereafter, *1974 Remedial Order*], the district court decreed injunctive relief and specified back-pay computation formulas. Judgment pursuant to the April order was entered May 20, 1974.

Both sides appealed. In a painstaking opinion, released October 20, 1976, a panel of this court affirmed the district court "on all substantive questions of statutory infringement" and "uph[e]ld most but not all the [district] court's specifications on relief." *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 437 (D.C. Cir. 1976) [hereafter, *Laffey I*]. NWA's petition for rehearing and suggestion for rehearing en banc were denied September 8, 1977; its petition for certiorari was denied February 21, 1978. 434 U.S. 1086.

When the case returned to the district court, in March 1978, NWA moved for relief from 1974 injunctive provisions, which had been stayed pending appeal and petition for certiorari, requiring it to furnish female cabin attendants single rooms on layovers and cleaning allowances for uniforms. The district court denied NWA's motion, and NWA appealed.

Again after careful review, on October 1, 1980, we affirmed the district court's order. *Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578 (D.C. Cir. 1980) [hereafter, *Laffey II*]. In the process, we observed that the 1974 order, reviewed in *Laffey I*, did not qualify as a final judgment because the district court had not at that point completed its work and disassociated itself from the case. *Id.* at 583-84. We noted, however, that the 1974 adjudication, awarding extensive injunctive relief, was appealable of right under 28 U.S.C. § 1292(a)(1) (1982), and that "the permanence and pervasiveness of the order's injunctive provisions enabled review on the merits of all interrelated features of the order save those the District Court had reserved for future adjudication." *Id.* at 584 n.49.

While clarifying that the 1974 district court adjudication was not a "final decision" within the meaning of 28 U.S.C. § 1291 (1982), we hastened to declare the district court "entirely right," *Laffey II*, 642 F.2d at 584, in declining NWA's request to modify the injunction; modification would have involved reopening issues already decided by that court and "laid to rest" when we affirmed the district court's directives in *Laffey I*. *Id.* at 584-85. We then stated with emphasis impossible to obscure that even if we were convinced of the error of a decision made on an earlier appeal in this litigation, we would adhere to the established "law of the case" absent extraordinary cause to depart from our precedent. *Id.* at 585-86. Pointedly, we cited the First Circuit's admonition against reconsideration "after denial of petitions for rehearing and certiorari." *Id.* at 585 & n.58 (citing *Legate v. Maloney*, 348 F.2d 164, 166 (1st Cir. 1965)).

The district court has now resolved all disputed matters in this protracted case. We approach the multiple issues raised by NWA and the three raised by plaintiffs mindful that "[i]f justice is to be served," *Laffey II*, 642 F.2d at

585, "[t]here must be an end to dispute." *Id.* (quoting *Legate v. Maloney*, 348 F.2d at 164, 166 (1st Cir. 1965)).

B. *Issues on Appeal*

We indicate here the order in which this opinion discusses the issues raised by the cross-appeals, and state, summarily, our disposition as to each issue.

1. NWA's Appeal

a. Alleging supervening Supreme Court decisions, NWA asks us to overturn i) the root determination that the purser/stewardess pay differential was based on sex, and ii) the already twice-reviewed determination that the cleaning allowance for men but not women discriminated impermissibly on the basis of sex. Discerning no clear change—indeed no change at all—in the governing law, we adhere to the law of the case on both issues.

b. Asserting a flaw in the determination that stewardesses and pursers performed "equal work," double faults in the measurement of backpay, oversights in the delineation of the Title VII class, and error in characterizing the Equal Pay Act violations as "willful," NWA urges alteration of prior dispositions on these questions. In view of the full and fair opportunity NWA had to litigate these issues in the district court and on appeal in *Laffey I*, we hold that "the strong policy of repose," *Laffey II*, 642 F.2d at 585, precludes consideration of NWA's earlier rehearsed arguments and more recent afterthoughts.

c. As to the Title VII back-pay accrual period, we adhere to the law of the case on the nonretroactivity of that statute's current two-year limitation. However, we modify the district court's specification of a three-year period borrowed from the District of Columbia's minimum wage law or general statute of limitations. Instead, we hold that, in the unique circumstances presented here, the time frame most appropriately borrowed is Minnesota's two-year limitation on "the recovery of wages . . . under

any federal or state law." Minn. Stat. Ann. § 541.09(5) (West Supp. 1982-1983).

d. Reviewing the district court's award of liquidated damages under the Equal Pay Act, we conclude that guidance supplied in *Laffey I* was properly followed and sustain the determination in all respects.

2. Plaintiffs' Cross-Appeal

a. As to credit for service prior to the passage of the Equal Pay Act and Title VII, *Laffey I* instructed only a "look at the collective bargaining agreement" on remand to determine whether "longevity" rather than "seniority" controlled. 567 F.2d at 476. Our opinion did not contemplate stripping plaintiffs of the pre-Act experience credits that the district court initially allowed them for the limited purpose of calculating the backpay NWA owed for post-Act service. Failure to accord plaintiffs longevity credit for all their days of service to NWA as stewardesses, in determining their post-Act pay level, would impermissibly project into the post-Act period a sex-based differential. We therefore reverse the district court's post-*Laffey I* ruling on this point and instruct that court to recognize plaintiffs' pre-Act longevity in calculating backpay for the relevant, post-Act, time periods.

b. As to interest, the district court properly declined plaintiffs' invitation to revisit the 1974 remedial order provision on the rate of pre-judgment interest. However, no "law of the case" settled the question of post-judgment interest on liquidated damages. That issue ripened on remand after our *Laffey I* decision. Reviewing the district court's ruling on the merits, we reverse the determination and hold plaintiffs entitled to post-judgment interest on liquidated damages.

In sum, we instruct the district court on remand to 1) allow backpay under Title VII beginning two years, not three years, prior to the filing of the first EEOC

charge; 2) credit plaintiffs with pre-Act longevity in calculating backpay due for post-Act service; and 3) allow post-judgment interest on liquidated damages. In all other respects, we affirm the district court's dispositions.

II. Alleged Supervening Supreme Court Precedent

Laffey I affirmed district court determinations that the purser/stewardess pay differential, and the cleaning allowance for men's uniforms but not women's, violated the Equal Pay Act and Title VII. Supervening Supreme Court decisions, NWA maintains, reveal that those affirmations were wrong. NWA cites *County of Washington v. Gunther*, 452 U.S. 161 (1981), as supervening precedent establishing that the purser/stewardess pay differential was lawful, and relies on *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), with regard to the cleaning allowance. Neither High Court decision, we conclude, alters the law earlier applied in this case. We therefore reaffirm *Laffey I* as the law of the case and of the circuit.[2]

A. *The Purser/Stewardess Pay Differential*

The alleged supervening decision, *County of Washington v. Gunther*, 452 U.S. 161 (1981), resolved this "sole issue": whether female jail guards who did not prove their work equal in skill, effort, and responsibility to the work of male jail guards, and therefore failed to establish an Equal Pay Act violation, could nonetheless challenge their rate of pay as discriminatory under Title VII. 452 U.S. at 166 n.8. The Supreme Court answered "yes"; it held that despite complainants' failure to satisfy the equal

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[2] A decision of one panel of this court may not be overruled by another panel; a panel's decision may be rejected only by the court en banc. *See* Brewster v. Commissioner of Internal Revenue, 607 F.2d 1369, 1373 (D.C. Cir.), *cert. denied*, 444 U.S. 991 (1979); United States v. Caldwell, 543 F.2d 1333, 1369 n.19 (D.C. Cir.) (citing cases), *cert. denied*, 423 U.S. 1087 (1976).

work standard, they could remain in court under Title VII on their charge that the County had set "the wage scale for female guards, but not for male guards, at a level lower than its own survey of outside markets and the worth of the jobs warranted." *Id.* at 166. Title VII, the Court explained, in contrast to the Equal Pay Act, does not bar "claims of discriminatory undercompensation . . . merely because [the female complainants] do not perform work equal to that of male [employees]." *Id.* at 181.

In imaginative argument, NWA asks us to spy a silver lining for employers in *Gunther*. NWA urges that the Supreme Court, in the process of rejecting a proffered restricted reading of Title VII, enlarged the scope of the Equal Pay Act's residuary affirmative defense, which permits payment of different wages if "made pursuant to . . . a differential based on any other factor other than sex."[3] For purposes of this argument, NWA concedes that pursers and stewardesses in fact performed "equal work" within the meaning of the Equal Pay Act.[4] But *grace a Gunther*, NWA contends, an employer "who premises a wage differential on his determination that two jobs are different" escapes Equal Pay Act and Title VII liability, "even if that conclusion is later found to be mistaken." Brief for Northwest Airlines, Inc. [hereafter, NWA Brief] at 33.

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[3] The Act specifies four affirmative defenses; they permit payment of different wages for equal work if "made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d, (1) (1982).

[4] Specifically, in presenting its *Gunther* supervening law position, NWA acknowledges "the district judge's determination of the objective equality of the [purser and stewardess] jobs and the amount and nature of the pay differential." *See* Reply Brief of Northwest Airlines, Inc. [hereafter, NWA Reply Brief] at 17.

For two reasons we cannot indulge NWA's endeavor to persuade us that *Gunther* widened the Equal Pay Act's exception for pay differentials "based on a bona fide use of 'other factors other than sex.'" *Gunther*, 452 U.S. at 170 (quoting 29 U.S.C. § 206(d)(1)(iv) (1982). First, NWA's position is incompatible with the statutory design. Under the Fair Labor Standards Act, which Congress adopted as the procedural and remedial framework for Equal Pay Act claims, a court has discretion to disallow, in whole or in part, liquidated (double) damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to [the violation] was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of t[he Act]." 29 U.S.C. § 260 (1982). NWA contends that an employer's actual but erroneous belief that two jobs are in fact different wholly shelters the employer from equal pay for equal work liability, NWA Brief at 14, 33; that contention is not synchronous with a congressional direction giving judges discretion only to limit, not to eliminate, damages when an employer, in "good faith," erroneously but reasonably believed his conduct conformed to legal requirements.[5]

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[5] We note, moreover, that *Laffey I* remanded the question of NWA's "good faith" for reconsideration by the district court, and supplied this instruction:

> Nor is it enough that it appear that the employer probably did not act in bad faith; he must affirmatively establish that he acted both in good faith and on reasonable grounds [the former involving a "subjective inquiry," the latter, "an objective standard"]. That duty is accentuated here, where the prevalence of sex-discrimination litigation against the airline industry naturally prompts the question whether NWA should reasonably have known that neither its own tradition [reserving pursers jobs and pay for men], the industry custom nor the employees' silence was a reliable indicium of the demands of the law.

Laffey I, 567 F.2d at 465 (footnotes omitted; quotations in brackets from *id.* at 464).

Second, NWA's inflation of the Equal Pay Act's residuary defense to exonerate employers who in fact failed to reward equal work with equal pay, so long as they honestly believed the jobs in question in fact were different, Reply Brief of Northwest Airlines, Inc. [hereafter, NWA Reply Brief] at 3-4, 19, is not sensibly extracted from Justice Brennan's opinion for the Court in *Gunther*. That decision interpreted Title VII to accommodate sex-based discrimination in compensation claims that did not fit within the equal pay for equal work principle. Specifically, *Gunther* rejected the argument that the "Bennett Amendment" to Title VII, 42 U.S.C. § 2000e-2(h) (1982),[6] confined Title VII sex-based wage discrimination complaints to claims that could also be brought under the Equal Pay Act. *Gunther* held that the Bennett Amendment had a more modest design: it simply incorporated into Title VII the Equal Pay Act's four affirmative defenses.[7] The *Gunther* opinion left untouched governing law on "equal pay for equal work regardless of sex." *See Corning Glass Works v. Brennan*, 417 U.S. 188, 190 (1974).

NWA features most prominently, *see* NWA Brief at 28-29, lines clipped from a passage in *Gunther* in which Justice Brennan focused on the Equal Pay Act's fourth affirmative defense, applicable to differentials "based on any other factor other than sex." 29 U.S.C. § 206(d)(1)(iv) (1982). In this passage, Justice Brennan stated that genuinely non-sex-based factors, for example, "a bona fide job rating system," might be used by an employer in setting compensation, without offense to federal law, even when such factors have a disparate impact on one sex. *Gunther*, 452 U.S. at 170-71 & n.11.

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[6] The Bennett Amendment provides that compensation differentiation "authorized by" the Equal Pay Act "shall not be an unlawful employment practice under [Title VII]." 42 U.S.C. § 2000e-2(h) (1982).

[7] *See supra* note 3.

Basing wages on "a bona fide job rating system"—a sex-neutral, objective measure—exemplifies the legitimate employer conduct Congress envisioned as a permissible "use of 'other factors other than sex,' " *Gunther* explained. *Id.* NWA, however, employed no "bona fide job rating system" or other sex-neutral, objective standard [8] in setting wage rates for pursers and stewardesses. The passage NWA clips, read in its entirety, contains no suggestion that Congress also envisioned as a bona fide "other factor" an employer's mere belief, untested by any objective job rating system, that men and women are not engaging in equal work. Indeed, a fair reading of the passage indicates just the opposite.[9]

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[8] *See, e.g.*, Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1136-37 (5th Cir. 1983) (indicating that experience, if in fact the basis for a pay differential, qualifies as a "factor other than sex," but holding that even when the employer introduces evidence demonstrating a male employee's greater experience, plaintiff must be accorded a full and fair opportunity to rebut proof that the pay differential was in fact attributable to a demonstrated objective, non-sex-based factor). *Plemer* reversed a district court judgment for defendant, and emphasized that "once [an Equal Pay Act] plaintiff shows that she was paid less than a male who was performing substantially the same job," "the burden both of production and of [ultimate] persuasion" shifts to the employer. *Id.* at 1136. Cited to us by NWA as a supplemental authority, *see* FED. R. APP. P. 28(j); D.C. CIR. R. 8(k), *Plemer* offers not a shred of support for NWA's thesis that no liability for an Equal Pay Act violation is incurred by an employer who sincerely believed jobs a court finds equal were in fact different.

[9] NWA constantly tenders cropped snippets that convey less than comprehensively the Court's statements in *Gunther*. As a further example, NWA quotes the Court as "observ[ing] that a prohibition against discrimination against women 'because of their sex' strikes [only] at '*disparate treatment* of men and women.' " NWA Brief at 29 (NWA's emphasis). The Court's opinion places the emphasis elsewhere: "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex

Gunther, in the portion featured by NWA, addressed only the impact Equal Pay Act affirmative defenses might have on "the outcome of some Title VII sex-based wage discrimination cases." *Gunther*, 452 U.S. at 170, 175 n.14. NWA, however, maintains that the Court's discussion should be read to augur incorporation of a line of Title VII "disparate treatment" decisions into Equal Pay Act law.[10] Even if we could find in *Gunther* the between-the-lines dictum NWA ascribes to the Court, NWA's argument for exoneration from equal pay liability would not succeed.

The Title VII decisions NWA cites unexceptionally involve situations in which the employer did not classify jobs overtly by sex (or race). *E.g.*, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In that setting, where sex-based categorization, if it exists, is covert, the Court has elaborated rules for establishing discriminatory intent or the lack thereof. This case, however, involves overt sex classification—explicitly disparate

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stereotypes." *Gunther*, 452 U.S. at 180 (quoting and adding emphasis to the Court's footnote in Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978), in turn quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971)). It is remarkable that NWA has selected and adjusted to suit its purpose words that originated with the Seventh Circuit in *Sprogis*, a decision holding an airline's no-marriage rule for stewardesses unlawful under Title VII.

[10] The Court indicated in *Gunther* that the Equal Pay Act's fourth affirmative defense might shelter a pay standard otherwise vulnerable under Title VII as "fair in form, but discriminatory in operation." 452 U.S. at 170 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)). NWA seizes on this acknowledgment that Equal Pay Act law may limit some Title VII neutral rule/"disparate impact" claims, and insists that the Court somehow meant to infuse into Equal Pay Act law Title VII "disparate treatment" analysis developed in cases of alleged nonovert sex classification not even cited *en passant* in *Gunther*.

treatment. Purser jobs were reserved for men only, the stewardess class was all-female.[11] NWA has cited no case, nor do we know any, suggesting that a Title VII or Equal Pay Act plaintiff must demonstrate, beyond sex-segregated job classifications and unequal pay for equal work, the employer's evil mind, in NWA's words, "disparate treatment" that proceeds from "discriminatory animus" or a "bad-faith attempt to evade the law." NWA Brief at 14, 39.

In sum, so far as we can tell, neither Congress nor the Court has ever entertained the notion that an employer who intentionally classifies jobs by sex, and in fact pays women less for the same work, can achieve exoneration by showing he sincerely thought the jobs he separated by sex were different. *But see* NWA Brief at 33; NWA Reply Brief at 3-4, 19. Justice Brennan's opinion in *Gunther*, it is certain, establishes no such novel law. Where, as here, there is an actual intent to separate jobs by sex, and the employer is found in fact to have paid women less for equal work, all precedent in point indicates that disparate treatment is solidly established.[12]

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[11] From 1947, when the purser classification was established, until June 15, 1967, NWA confined the purser position to males. Betweeen 1949 and 1957, NWA hired men for a second cabin attendant position. Men engaged for these posts were called "flight service attendants" (FSAs). FSAs performed essentially the same duties and received the same pay as female cabin attendants. Unlike the all-female stewardess class, however, FSAs had a contractual right to fill purser vacancies and were deemed qualified for purser posts upon completion of the FSA probationary period. By May 1965, all but three of the FSAs who remained with NWA had been elevated to purser positions. The three men who had not advanced to the purser category were voluntarily based in Hawaii. *See 1973 Findings*, 366 F.Supp. at 766-67, 772-73 (Findings of Fact (FOF) 11-17, 37-38).

[12] An employer's "discriminatory motive" or "desire to pay men—because they were men—more than [women received]," far from ranking as an "essential element" of a plaintiff's

In *Goodrich v. International Brotherhood of Electrical Workers*, 712 F.2d 1488, 1493 n.11 (D.C. Cir. 1983), we noted that the Equal Pay Act's residuary defense covering "factors other than sex" affords no "convenient escape from the Act's basic command." Unless and until Congress or the Supreme Court declares otherwise, our dominant guides remain the command that "equal work will be rewarded by equal wages," S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963), and the instruction that the Equal Pay Act is a "broadly remedial" statute targeting an "endemic problem of employment discrimination," by firmly establishing as federal law the "principle of equal pay for equal work regardless of sex." *Corning Glass Works*, 417 U.S. at 190, 195, 208. NWA's argument, attributing to *Gunther* a meaning that would substantially reduce the force of the federal equal pay requirement, is artful but unavailing; it fails to elevate from the untenable to the plausible the claim that in *Laffey I* we incorrectly stated the law governing the purser/stewardess pay differential.

B. *The Uniform Cleaning Allowance*

Laffey I affirmed the district court's determination that NWA discriminated on the basis of sex by providing a male-only uniform cleaning allowance. 567 F.2d at 456. *Laffey II* held a second challenge to the district court's ruling on the cleaning allowance unwarranted by any "circumstance capable of generating injustice from adherence to the law of the case." 642 F.2d at 586. Despite the stern "law of the case" analysis and admonition in *Laffey II*, *id.* at 585-86, and the court's further

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claim, as NWA maintains, *see* NWA Brief at 14, 34, is not even relevant, under the Supreme Court's decisions, to the determination whether explicitly sex-based classification violates Title VII. *See* Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 103 S. Ct. 3492 (1983); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978). *See also infra* note 15.

statement that it considered *Laffey I*'s cleaning allowance holding "fully accurate," *id.* at 586,[13] NWA seeks to continue the fray. It cites *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and describes that case as an "intervening decision," NWA Brief at 17, although *Gilbert* issued over two years before *Laffey II* was argued.[14]

Gilbert was a Title VII challenge that turned on the Court's conclusion that the disability program in question did not group persons by "gender as such." *Gilbert*, 429 U.S. at 134-35 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 & n.20 (1974)). The issue was an employer's exclusion of women unable to work due to pregnancy or childbirth from disability benefits. The program did not divide potential recipients by "gender as such," the Court reasoned, because one of the two groups comprised "non-pregnant persons," and thus "include[d] members of both sexes." *Gilbert*, 429 U.S. at 134-35. In the absence of classification based upon "gender as such," the Court inquired whether there was any "gender-based discrimi-

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[13] The court reviewed its prior holding, not for NWA's benefit, but "in the interest of soundness of the law for the future." *Laffey II*, 642 F.2d at 586. It acknowledged that outlays for uniforms and their maintenance, when made primarily for the employer's benefit, do not count as wages under the Fair Labor Standards Act. *Id.* at 588. Allowances that primarily serve the interest of the employee, however, do qualify as wages, the court stated. The male-only cleaning allowance, the court concluded, was a wage supplement, a benefit to the employee rather than a "boon to the employer." *Id.* at 589. Had the allowance primarily benefited the employer rather than the employee, the court observed, "NWA obviously would have extended it to female cabin attendants as well." *Id.*

[14] Moreover, the precedential force of *Gilbert* had become clouded before presentation of the *Laffey II* appeal. *See* Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 723-25 (1978) (Blackmun, J., concurring).

natory effect." *Id.* at 137-39. NWA relies on the "discriminatory effect" portion of the *Gilbert* analysis. NWA Brief at 53.

Even in *Gilbert* itself, however, the Court indicated that "discriminatory effect" analysis should not come into play when the program at issue divides recipients into groups classified by "gender as such." 429 U.S. at 136-37 & n.15.[15] That is the situation here—all male cabin attendants received a uniform benefit package with a cleaning allowance, all female attendants received a different package without a cleaning allowance.[16]

Congress has overruled *Gilbert* prospectively "to prohibit sex discrimination on the basis of pregnancy," [17] and the Supreme Court believes Congress "also rejected the test of discrimination [*Gilbert*] employed." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 103 S. Ct. 2622, 2627, 2631 (1983). In its most recent expression

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[15] NWA, in its *Gilbert* argument, manifests a blindspot similar to the one evident in its failure to perceive, in presenting its *Gunther* argument, that when an employer intentionally classifies jobs or job benefits by sex, one need not search further to find differential treatment based upon gender. *Compare, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) *with* Personnel Administrator v. Feeney, 442 U.S. 256 (1979).

[16] NWA, in its Reply Brief at 27-28, suggests that we view uniform-related benefits as a "grooming" issue with no discriminatory implications because of the "conventional distinction" in apparel men and women wear. While it is too late for NWA to dress the matter in new garb, we note that the question here is not whether men can be required to wear pants, and avoid kilts. *Cf.* Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084 (5th Cir. 1975) (en banc) (holding that Title VII is not violated by an employer's refusal to hire men (but not women) with long hair). Women's clothes require cleaning just as men's do; and prescribing more costly uniforms for stewardesses was NWA's decision, not a benefit women sought or an action impelled by the market or convention.

[17] *See* Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)).

in point, the Court left no doubt that, when classification by sex is undisguised, there is no need to consider, as *Gilbert* did, "the average monetary value of the [overall benefit package in question] to male and female employees." *Id.* at 2632 n.26. Further, the Court quoted with apparent approval the EEOC's position that it is not "a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." *Id.* (quoting 29 C.F.R. § 1604.9(e) (1983)).

In *Laffey II*, the court described the cleaning allowance "as simply another supplement to male salaries." 642 F.2d at 589. *Gilbert* presents no occasion for us to study again that twice-studied issue. *See id.* at 586.

III. Additional Law of the Case and Waiver Issues

A. *Laffey I Holdings Challenged as "Clearly Erroneous"*

NWA does not dispute that *Laffey I* "actually decided" two issues which it now seeks to relitigate: first, that "equal work" was performed by NWA stewardesses and pursers, and second, that NWA, as a matter of law, could have "willfully" violated the Equal Pay Act notwithstanding the absence of an "iniquitous . . . state-of-mind." *Laffey I*, 567 F.2d at 461; NWA Brief at 11 n.1, 13. NWA seeks to reopen these two issues, not by posting the existence of supervening case law, but by arguing that our prior holdings were "clearly erroneous" and that adherence to law of the case in these instances "would work a manifest injustice." *Melong v. Micronesian Claims Commission*, 643 F.2d 10, 17 (D.C. Cir. 1980) (quoting *White v. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967)).[18]

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[18] The Supreme Court recently noted approvingly the dual elements of "clear error" and "manifest injustice" in law of the case doctrine, citing the *White v. Murtha* decision on which this court relied in its *Melong* analysis. *Arizona v. California*, —— U.S. ——, ——, 103 S. Ct. 1382, 1391 n.8 (1983).

Because we perceive no error whatever in *Laffey I*'s disposition of these two issues, let alone the "clear" error and "manifest injustice" that would warrant departure from the law of the case, we reject NWA's arguments and reaffirm the holdings of *Laffey I* with respect to the issues of equal work and willfulness.

Moreover, we take this opportunity to emphasize that this court will not, absent truly "exceptional circumstances," *Laffey II*, 642 F.2d at 585, look favorably on arguments against the law of the case which fall only under the "manifest injustice" rubric.[19] We do not intend to allow this avenue of attack on the law of the case to become an auxiliary vehicle for the repetition of arguments previously advanced, without success, in appellate briefs, petitions for rehearing, and petitions for certiorari.

1. *Equal Work*

In its *1973 Findings*, the district court concluded that the jobs of purser and stewardess at NWA "require equal skill, effort and responsibility and are performed under similar working conditions." 366 F. Supp. at 788, 789 (Finding of Fact (FOF) 78; Conclusions of Law 2,4). In *Laffey I*, this court explicitly affirmed this finding and conclusion, 567 F.2d at 453, thus establishing the equal work prerequisite to Equal Pay Act liability as the law of the case.

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[19] *Laffey II*, 642 F.2d at 585-86, set out the following situations, drawn from *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 278-79 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972), in which a court may recall its mandate, to illustrate circumstances justifying a deviation from the law of the case:

> [T]o correct clerical mistakes, to clarify [the] opinion or mandate, to remedy fraud on the court or other misconduct, to avoid divergent results in cases pending simultaneously, or to minister to other similar aberrations.

No such aberrations are present in the instant case.

NWA's challenge to this holding hinges on its interpretation of two of the district court's findings of fact in 1973. In one pivotal finding, FOF 65, the district court described the "chain of command" for an NWA flight:

> If one purser is aboard, he is denominated the Senior Cabin Attendant irrespective of his relative length of service as compared to the other attendants. If two or more pursers are aboard the flight, the most senior purser is the Senior Cabin Attendant. If no purser is aboard the flight, the most senior stewardess or FSA is the Senior Cabin Attendant.

1973 Findings, 366 F. Supp. at 785. The nature and scope of a Senior Cabin Attendant's supervisory responsibilities is described in another critical finding, FOF 67:

> Stewardesses who serve as Senior Cabin Attendant are subject to discipline if they fail to carry out their "supervisory" responsibilities, and are held just as accountable as pursers who fail to carry out their "supervisory" responsibilities.

Id. The district court also noted in this latter finding that NWA had no merit pay adjustment whereby either pursers or stewardesses who "supervise" effectively were paid more than less capable or effective supervisors.

Seizing upon the district court's recognition in FOF 65, above, that pursers supervised stewardesses, but not *vice versa*, NWA argues vehemently that the two jobs cannot be deemed "equal" because "[j]obs that entail different degrees of supervisory responsibility are not equal within the meaning of the Equal Pay Act." NWA Brief at 41. Next, relying upon the court's description in FOF 67, above, of the cabin attendants' "accountability" for the discharge of their supervisory duties, NWA maintains that the district court's findings "compel the conclusion that the supervisory responsibility had real content" and that *Laffey I*'s conclusion that the pursers' supervisory function was "insignificant" thus "actually contradicted the trial judge's findings." *Id.* at 42.

We cannot accept either branch of NWA's argument. It is, of course, elementary that "jobs need not be identical in every respect before the Equal Pay Act is applicable . . . ." *Corning Glass Works v. Brennan*, 417 U.S. 188, 203 n.24 (1974). In *Laffey I*, this court explained:

> [T]he phrase "equal work" does not mean that the jobs must be identical, but merely that they must be "substantially equal." A wage differential is justified only if it compensates for an appreciable variation in skill, effort or responsibility between otherwise comparable job work activities.

567 F.2d at 449 (citations omitted). This "substantially equal" test, which has been adopted by no fewer than nine other circuits, *Thompson v. Sawyer*, 678 F.2d 257, 272 n.12 (D.C. Cir. 1982), necessarily implies that there can be job responsibilities—including supervisory duties—so " 'insubstantial or minor' " as not to " 'render the equal pay standard inapplicable.' " *Laffey I*, 567 F.2d at 449 (quoting 29 C.F.R. § 800.122 (1975)).

Therefore, to the extent that NWA's argument suggests that *any* difference in supervisory responsibility renders jobs unequal, it is manifestly incorrect as a matter of law. Critically, the authority NWA cites as support for this proposition is not, in fact, inconsistent with the "substantially equal" test.[20] Indeed, NWA itself acknowledges

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[20] NWA cites *Usery v. Richman*, 558 F.2d 1318, 1321 (8th Cir. 1977); *Noles v. Concord Lace Corp.*, 25 FEP Cas. (BNA) 367, 370 (M.D.N.C. 1980), and 29 C.F.R. §§ 800.122, 800.130 (1983), as authority for its assertion that "[j]obs that entail different degrees of supervisory responsibility are not equal within the meaning of the Equal Pay Act." NWA Brief at 41. None of these authorities conflict with the view of the court in *Laffey I* that supervisory responsibilities can be so minor as not to render two jobs unequal.

Indeed, NWA grossly misreads *Usery*'s holding. In *Usery*, the court explicitly followed the Eighth Circuit's use of the "substantially equal" standard of comparison in evaluating the work of a male cook and four female cooks. 558 F.2d at

several other cases in which supervisory responsibilities were found to be too minor to warrant a finding of unequal responsibility. *See Hill v. J.C. Penney Co.*, 688

1320. That case in no wise stands for the proposition that any difference in supervisory responsibilities, without more, automatically works a cognizable legal difference in jobs. To the contrary, NWA conveniently and inexplicably overlooks the clear statements in *Usery* that the male employee had different responsibilities than female employees, worked during the cafe's busiest hours, was given greater duties of heavy lifting, was responsible for training other employees, and "had authority to make effective recommendations with regard to discipline." All this was sufficient for the Eighth Circuit to conclude, in affirming the district court's factual findings, that the job of the male employee had "[e]nough substantial distinctions [as to both] effort and responsibility . . ." to render it legally different from the jobs of the four female employees. That case is a far cry from the instant situation.

Similarly, in *Noles* the district court employed a "substantially equal" analysis in finding that the work of one male employee, who was "in charge of" an entire shift in one department of a textile mill, was not equal to that of the plaintiffs. Since the *Noles* opinion does not describe the nature of the male worker's supervisory responsibilities, NWA cannot plausibly maintain that the case stands for the proposition that any difference in supervisory duties renders jobs unequal. Moreover, another male worker had heavy lifting functions and was one of only a few employees trained in the operations of a particular kind of plant machinery.

Finally, NWA can find no support in the cited Wage and Hour Division of the Department of Labor regulations. On the contrary, 29 C.F.R. § 800.122 clearly states that "[i]nsubstantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs will not render the equal pay standard inapplicable." Far from offering support to NWA at this late stage of the litigation, this section, as noted in the text above, was invoked by the *Laffey I* court in its discussion of equal work. Nor does § 800.130 provide any comfort to NWA. That section states, *inter alia*, the common-sense proposition that if an employee assumes supervisory responsibilities during the absence of the

F.2d 370, 373-74 (5th Cir. 1982); *Hodgson v. American Bank of Commerce*, 447 F.2d 416, 422 (5th Cir. 1971).

NWA's claim that *Laffey I*'s finding of equal work "actually contradicted" the district court's findings is also patently incorrect. As we understand NWA's argument, FOF 67, when read together with FOF 65, "compels" the conclusion that the district court viewed the supervisory responsibilities as not insubstantial. This contention, however, plainly overlooks the district court's express finding that the pursers' supervisory functions "require no greater skill, effort or responsibility than the other functions assigned to all cabin attendants," *1973 Findings*, 366 F. Supp. at 786 (FOF 69), and its further explicit finding of equal "skill, effort and responsibility" on the part of stewardesses and pursers, *id.* at 788-89 (FOF 78; Conclusions of Law 2,4). It follows as ineluctably as night follows day that the district court found that the pursers' supervisory duties did not alter the equivalence of the two jobs under scrutiny in this case.[21]

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regular supervisor, higher wage rates to such a "relief" supervisor may be appropriate. But to embrace this proposition scarely means that we should read out of the regulations the bedrock principle that "insubstantial or minor differences" in skill or responsibility do not constitute a legally significant distinction between jobs. The issue is not, as NWA would have it, whether there are "different degrees of supervisory responsibility" but whether the differences are insubstantial and minor. As to that issue, NWA's arguments fail completely.

[21] NWA claims that FOF 69 reflects an "erroneous assumption" by the district court that "the issue under the Equal Pay Act is whether the jobs are more alike than they are different . . . ." NWA Brief at 42. This argument falls before the express language and plain meaning of FOF 69—that the supervisory functions "require no greater . . . effort or responsibility." NWA is conveniently seeing ghosts in conjuring up the image of a district court—eleven years and two appeals ago—having fallen into error by embracing allegedly erroneous assumptions.

There is, in cutting through the prolific underbrush planted in our way by NWA, upon analysis no conflict whatever between the district court and this court as to the importance of the supervisory duties assigned to pursers. *Laffey I* affirmed the district court's finding that "NWA purser and stewardess positions are substantially equal within the intent of the Equal Pay Act . . . ." 567 F.2d at 453. NWA has come forward with nothing to suggest that this affirmance of the district court's conclusion with respect to the importance of supervisory duties was in error. NWA's argument, based ultimately on a tortured reading of the district court's findings and an inaccurate portrayal of the applicable law, fails.

2. *Willfulness*

Under 29 U.S.C. § 255(a) (1976), a "willful" violation of the Fair Labor Standards Act (FLSA), of which the Equal Pay Act is a part, triggers a three-year, as opposed to the Act's ordinary, two-year statute of limitations. In *Laffey I*, this court determined that NWA's violation of the Equal Pay Act had been "willful" within the meaning of section 255(a), 567 F.2d at 463, thus rendering NWA liable for a third year of backpay. In reaching this conclusion, the court canvassed the legislative history of section 255(a) and rejected NWA's suggestion that a violation must be animated by a bad purpose or evil intent to be deemed willful. *Id.* at 461. Instead, the court determined that employer noncompliance with the Equal Pay Act is "willful" in at least two other instances: where the employer "is cognizant of an appreciable possibility that he may be subject to the statutory requirements and fails to take steps reasonably calculated to resolve the doubt," and where "an equally aware employer consciously and voluntarily charts a course which turns out to be wrong." *Id.* at 462.

NWA was held to have failed the second branch of this test:

> NWA not only knew of the Equal Pay Act and its content but also correctly understood its prohibition on different salary levels for men and women performing substantially similar work. With little or nothing beyond internal consideration by laymen—even after the present legal challenge got under way—the company consciously though erroneously concluded that its treatment of pursers and stewardesses was unaffected by the Act. We deem that sufficient to comprise willfulness; in the District Court's words, "[t]he conduct of the Company in the exercise of that judgment was willful."

Id. at 463 (citation omitted).[22]

In this appeal, NWA argues that the law of the case established in *Laffey I* is "clearly erorneous" and the source of "manifest injustice," once again urging upon us a contrary analysis of the legislative intent undergirding section 255(a). NWA contends that a proper reading of the legislative history of the 1966 FLSA amendments "confirms that Congress meant [the willfulness standard] to encompass only intentional disregard for the law, rather than the deliberate-but-erroneous test adopted" in *Laffey I*. NWA Brief at 23. For the reasons stated below, we disagree with NWA as to the proper test of willfulness under the Equal Pay Act. Accordingly, we reaffirm *Laffey I*'s finding that NWA willfully violated the Act within the meaning of section 255(a).

In recasting its version of the relevant legislative intent, NWA argues that the *Laffey I* court was erroneously of the view that there was no relevant legislative history to shed light on the pivotal word, "willful." NWA Brief at 85. NWA accordingly invites us to focus on three unadopted 1965 bills which were the predecessors of the 1966

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[22] Similar considerations regarding NWA's meager efforts to ascertain its obligations under the Equal Pay Act were central to the district court's award of liquidated damages, on remand from the decision in *Laffey I*, as discussed *infra* in section V.

amendments. NWA deems "crucial" certain portions of the hearings on one of those bills, H.R. 8259, 89th Cong., 1st Sess. (1965), and the report of the House Education and Labor Committee on a second bill, H.R. 10518. H.R. Rep. No. 871, 89th Cong., 1st Sess. (1965). The importance of the latter is touted on the basis that it represents the "first appear[ance] [of section 255(a)] in its present form." NWA Reply Brief at 42.[23]

The original administration-sponsored bill, H.R. 8259, sought, *inter alia*, to increase the limitations period to three years for all FLSA claims, and accordingly did not prescribe willfulness as a precondition to liability for the third year. NWA attempts to fashion a favorable interpretation of the willfulness provision ultimately incorporated into section 255(a) in the following manner: first, NWA summarizes a few snippets of testimony against H.R. 8259,[24] and then notes that at the conclusion of the

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[23] NWA claims that the *Laffey I* court "overlooked" this committee report. *Id.* While the opinion in *Laffey I* does not expressly refer to the report, it is clear that the court was aware of the genesis of section 255(a) as we know it. *See* 567 F.2d at 460 & n.222 (reference to hearings on H.R. 8259). Even though neither party called the court's attention to the committee report in *Laffey I*, there is no reason to believe that the court was unaware of it. Moreover, NWA baldly overargues the point that the *Laffey I* court was operating without benefit of the enlightening legislative history which NWA has unearthed at the eleventh hour. NWA says that the *Laffey I* court fashioned its "willfulness" test "on the impression that there was no relevant legislative history." NWA Brief at 85. *Laffey I* said no such thing, nor did it imply as much. Rather, the court noted, quite correctly, that it had uncovered no "*clearcut statement* in the legislative history as to why the extension to three years was thus encumbered." 567 F.2d at 460 (emphasis added).

[24] NWA specifically references a colloquy between Secretary of Labor Wirtz and Congressman Martin, an opponent of all three bills considered in 1965, in which Rep. Martin expressed concern that an across-the-board extension of the limitations period to three years would penalize employers

hearings, "the Subcommittee met in executive session and drafted a new bill that included the [willfulness] language ultimately enacted." NWA Brief at 85. NWA then attributes this change to legislators who opposed the extension of liability in cases not involving conscious disregard of the law. *Id.* at 86. To substantiate this new learning as to the true meaning of the legislative materials, NWA cites a sentence from the minority statement in the Committee report on the revised bill, indicating that the Subcommittee's discussions had "resulted in the adoption of several amendments offered by members of the minority." *Id.* (citing H.R. Rep. No. 871, *supra*, at 74). NWA jumps from this statement to the conclusion that the willfulness provision was adopted "in response to the criticism of the proposal to impose an additional year of liability even on 'honest' violators of the [Equal Pay] Act." NWA Reply Brief at 42.

NWA's argument proves no such thing. The single sentence upon which it relies from the minority statement provides woefully inadequate support for its restrictive reading of the "willfulness" language. That sentence stands all by itself in the introduction to the minority report. Nowhere in this document is there any description of the amendments which the minority proposed, why it proposed them, what the majority said in response to the proposals, or why the proposals were adopted by the full Committee. Moreover, the minority report does not contain *a single word* about the "willfulness" provision in H.R. 10815. This brings us, then, to a broader point about this provision. The proposed legislation was

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who had not deliberately violated the law. *Hearings on H.R. 8259 Before the House Ed. and Labor Comm., General Subcomm. on Labor*, 89th Cong., 1st Sess. 54 (1965). NWA also notes that a number of witnesses in the hearings on H.R. 8259 were of the opinion that the back-pay period "*should not* be increased for violations which 'result from misunderstanding of the law,' or 'honest differences of opinions.'" NWA Brief at 85, citing *id.* at 980, 2250 (emphasis added).

lengthy, complex, and dealt with a number of thorny issues, including an increase in the minimum wage and a significant expansion of the FLSA's coverage. Adoption of the "willfulness" language ultimately codified in section 255(a) was undoubtedly a matter of limited congressional focus in the 1965 and 1966 deliberations over this legislation; the paucity of pertinent legislative materials, therefore, is not surprising.

Given the relative silence of the legislative record in this respect, *Laffey I*, 567 F.2d at 460, a silence which NWA has not persuasively broken with its theory advanced on this third appeal, we defer to the careful treatment and final settlement of this issue in *Laffey I*. The law of the case we honor here rests on the *Laffey I* court's painstaking review of the legislative history, including Congress' pivotal concern over small, unsophisticated businesses—a category that manifestly excludes NWA—which might not recognize the sweep of the FLSA's coverage. *Id.* at 460-61. Equally important, *Laffey I* recognized the need for a liberal construction of remedial statutes, and at the same time appropriately took into account the absence of clear congressional intent to impose upon plaintiffs the heavy burden of demonstrating an employer's evil intent. *Id.* This latter point is especially important in light of the fact that the Equal Pay Act merely allows a plaintiff to recover, after an appropriate showing, wages which have been improperly denied, and does not involve the imposition of criminal sanctions.

In short, we find nothing compelling, and certainly nothing demonstrating "clear error" in this court's earlier opinion, in the 1965 sources relied upon by NWA. The careful analysis of the meaning of 29 U.S.C. § 255(a) set out in *Laffey I* must stand.

B. *Backpay*

Moving from the domain of the Equal Pay Act's legislative history to an issue under Title VII, the district

court's *1974 Remedial Order* awarded each Title VII plaintiff [25] backpay in the amount of the full difference between what she earned as a stewardess and what she would have earned if she had been paid at the same rate as a purser of equal seniority. 374 F. Supp. at 1385-86. On appeal in *Laffey I*, NWA challenged certain aspects of these "remedial measures," 567 F.2d at 437, including what it saw as the district court's improper refusal to adjust the pursers' rates of pay downward in the amount of the compensation allegedly based on the "foreign flying" required of pursers. Of pivotal importance, however, NWA failed at that time to appeal the underlying decision to use pursers' pay rates as the upper end of the backpay formula.

The court in *Laffey I* determined that NWA had failed to show that any portion of the pursers' pay was attributable to "foreign flying." 567 F.2d at 452 n.153. *See infra* section III. B.2. The *Laffey I* decision also affirmed the back-pay formula adopted by the district court. *Id.* at 478.

In 1978, following the remand of these proceedings to the district court after *Laffey I*, NWA for the first time attacked the use of the full purser rates, apart from its unsuccessful, earlier argument with respect to the alleged "foreign flying" component. NWA at this juncture claimed that the district court should use a hypothetical wage rate which would have been paid to a single, combined class of "cabin attendants," rather than purser rates, in computing backpay. Record Document ("R.") 16. The district court, however, refused to entertain NWA's argument, on the ground that "the relief requested is precluded by the Judgment of the Court of Appeals in

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[25] It will be recalled that the instant action was brought both under Title VII and the Equal Pay Act. The back-pay element of relief was granted by the district court as part of the remedy to the Title VII class, as well as to the Equal Pay Act plaintiffs. In this appeal, NWA's challenge to the computation of backpay is with respect to the Title VII plaintiffs only.

that it is beyond the Mandate of that Court and seeks to raise issues not challenged on appeal . . . ." Order Denying Motion to Modify Award of Backpay to the Title VII Class (D.D.C. July 9, 1979), R. 50.

NWA now seeks to avoid the law of the case as to the computation of backpay by arguing that under the post-*Laffey I* decisions of the Supreme Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978), and *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982), the back-pay award here impermissibly overcompensates the Title VII plaintiffs by placing them "in a better position than they would have been in if the alleged discrimination had not occurred." NWA Brief at 15; *see* also *id.* 43-47. NWA also revives its earlier, unsuccessful argument that the back-pay awards under both Title VII and the Equal Pay Act are incorrectly inflated by the court's failure to exclude from pursers' pay that portion attributable to "foreign flying." NWA once again tries to characterize "foreign flying" compensation as a "factor other than sex" for Equal Pay Act purposes, and invokes the three above-cited High Court decisions in support of its claim that Title VII damages should be reduced by this amount.

Because this court affirmed the backpay awards in *Laffey I*, and inasmuch as we discern no relevant supervening change in the law embodied in the decisions relied upon by NWA, we decline the invitation to overturn the law of the case as to the computation of backpay.

1. *Wage Rate for Hypothetical Combined Cabin Attendant Classification*

NWA strenuously contends that if it had not maintained the sex-segregated job classifications of purser and stewardess and had, instead, used only a single "cabin attendant" classification, the wage rate paid to employees in that hypothetical classification would have closely approxi-

mated the rates paid by other airlines with only a single classification, rather than the "premium pay level" NWA established for pursers. In support of this proposition, NWA relies upon an affidavit proffered in 1978. *See* Declaration of Terry M. Erskine, Joint Record Excerpts ("J.R.E.") 139.

NWA argues that the use of the pursers' pay rate in the back-pay formula, rather than the lower rate which arguably would have been paid to those in the hypothetical, combined cabin attendant classification, violates the bedrock rule that Title VII backpay may not "catapult [plaintiffs] into a better position than they would have enjoyed in the absence of discrimination." *Ford Motor, supra*, 458 U.S. at 234. It also argues that *Manhart*, in particular, establishes that the back-pay remedy here was improper. NWA Brief at 43-44.

We disagree. In the first place, and most critically, we do not read these three High Court decisions as establishing *any* pertinent new rule of law as respects this case under Title VII. The fundamental proposition that the purpose of Title VII remedies is to "make whole" the victims of discrimination has been settled for some time, *see, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975), and was clearly recognized by this court in *Laffey I*. *See* 567 F.2d at 476 ("The remedial order in this case is to make employees whole, but not more than whole."). Therefore, we perceive nothing new, as respects NWA's argument, in these three decisions.

We also find unpersuasive NWA's assertion that *Manhart* compels the abandonment of the back-pay formula affirmed in *Laffey I*. Above all, *Manhart* arose out of the extraordinarily sensitive setting of a sex-based contributory system in a pension plan, circumstances far removed from the situation here of treating female employees differently although they performed the same work as male employees. Second, the only language that provides comfort

to NWA is set forth in a single footnote,[26] consisting of guardedly worded *dicta*. *Manhart*, in contrast to the case before us, disallowed *any* retroactive monetary award, and in the course of so doing suggested that *if* such an award had been appropriate, the lower court "should at least have considered" a different formula. The High Court's understandably deep concern for equitable considerations, including the grave consequences to pension funds flowing from a retroactive finding of liability, strongly suggests that this portion of the *Manhart* footnote was not addressed to the matter of remedies in garden-variety Title VII cases, such as the case at hand.[27]

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[26] Footnote 36 of the *Manhart* opinion reads, in relevant part:

> Further doubt about the District Court's equitable sensitivity to the impact of a refund order is raised by the court's decision to award the full difference between the contributions made by male employees and those made by female employees. This may give the victims of the discrimination more than their due. If an undifferentiated actuarial table had been employed in 1972, the contributions of women employees would no doubt have been lower than they were, but they would not have been as low as the contributions actually made by men in that period. The District Court should at least have considered ordering a refund of only the difference between contributions made by women and the contributions they would have made under an actuarially sound and nondiscriminatory plan.

435 U.S. at 720 n.36.

[27] It is, as we note in the text above, clear that *Manhart* involved Title VII principles in the extraordinarily sensitive and complex setting of a contributory pension plan. Concern for the financial stability of pension plans, upon which employees ultimately rest their hopes and expectations for financial security at retirement, was evident throughout the Court's opinion. As Justice Stevens, speaking for the Court, put it: "Nor can we ignore the potential impact which changes in rules affecting insurance and pension plans may have on the economy. Fifty million Americans participate in retirement plans other than Social Security." 435 U.S. at 721. *See also*

Moreover, in the absence of supervening, controlling authority, NWA cannot properly request—for the first time—that this court mandate the use of "averaging techniques" in the back-pay formula.[28] As explained *supra* at pp. 5-6, the procedural posture of this case at the time of *Laffey I* "enabled review on the merits of all interrelated features of the order save those the District Court had reserved for future adjudication, *Laffey II*, 642 F.2d at 584 n.49. The issues reserved by the district court dealt only with the "mechanics of payment" pursuant to the *1974 Remedial Order*. *See* 374 F. Supp. at 1389. The part of the case that the court reserved obviously did not include the back-pay formula itself, which was clearly set out by the district court, *id.* at 1385-87 (paragraphs 5-7), and which plainly used the full purser pay rates as the upper end of the back-pay computation.[29] Thus, NWA had the opportunity to appeal any feature of the back-pay award, including the use of the full purser rates, in *Laffey I*. Therefore, NWA must be deemed to have waived any argument available at that time which it did not assert.

Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, —— U.S. ——, ——, 103 S. Ct. 3492, —— (1983) (O'Connor, J.) (to avoid adverse impact on pension funds, decision extending *Manhart*'s liability rule should be made prospective).

[28] NWA did not have to languish on the legal sidelines awaiting the 1978 culmination of the *Manhart* litigation. *Manhart* scarcely enunciated for the first time a principle that, save for its footnote 39, would have theretofore been unsupportable in Title VII law or theory. As we previously indicated, *Manhart* in this particular respect broke no new legal ground, but instead observed the possible effects of the well-established "make whole" principle in the setting of that case.

[29] It further appears from the record that NWA considered the district court's *1974 Remedial Order* to be a final judgment. *See* R. 161 (NWA Notice of Appeal from "[t]he final judgment entered in this action on May 20, 1974 . . . ."), R. 160, R. 164 (NWA supersedeas bond entered in its appeal from the May 20, 1974 "final judgment").

Adherence to the rule that a party waives a "contention that could have been but was not raised on [a] prior appeal," *Munoz v. County of Imperial*, 667 F.2d 811, 817 (9th Cir.), *cert. denied*, 459 U.S. 825 (1982), is, of course, necessary to the orderly conduct of litigation. Failure to follow this rule would lead to the bizarre result, as stated admirably by Judge Friendly, "that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost." *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981), *cert. denied*, 459 U.S. 828 (1982). NWA's failure to challenge the back-pay formula on its first appeal resulted in the *Laffey I* affirmance of that portion of the *1974 Remedial Order*, and the inclusion of the formula in the law of the case. *See Raxton Corp. v. Anania Associates, Inc.*, 668 F.2d 622, 624 (1st Cir. 1982).

2. *Foreign Flying*

As previously indicated, NWA reargues its already rejected position that purser pay included compensation directly traceable to "foreign flying" and that this component of compensation should be excluded as a "factor other than sex" under the Equal Pay Act back-pay computations, and from the Title VII back-pay computations under the Supreme Court decisions discussed *supra* in section III. B.1.

We disagree. We find, for the reasons outlined in the preceding section, that the Supreme Court decisions in *Manhart*, *Teamsters*, and *Ford Motor* do not bring into question the treatment in *Laffey I* of the "foreign flying" issue, as those cases merely articulate already established principles of Title VII law.[30] NWA's other arguments on

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[30] At most, NWA can argue that *Manhart* expressly mandates "equitable sensitivity" in fashioning back-pay awards. This principle does not embody some novel and independent requirement, but rather is aimed at ensuring the fidelity of

this issue are foreclosed by the law of the case, clearly set out in *Laffey I*, 567 F.2d at 452-53 n.153. Unless there is supervening authority, and we have concluded that there is none, NWA must satisfy the stringent test of "clear error" and "manifest injustice," a rigorous standard which has not been met as to the foreign flying issue. As this court held eight years ago, NWA simply failed to carry its burden on this issue the first time around. We refuse to replough this well worn field that much deserves henceforth to lie fallow.

C. *Composition of the Title VII Class*

NWA challenges the composition of the Title VII class on several grounds. It argues that the district court's order of December 5, 1980, J.A. 168, improperly added to the class "hundreds of new employees" who had been "hired after the cut-off date for the last round of notices" of the class action. NWA Brief at 55-56. NWA also appeals from the district court's order of June 6, 1980, J.R.E. 162, which included in the Title VII class two groups of stewardesses which NWA seeks to exclude—those on leave from their jobs as stewardesses as of the cut-off date who subsequently decided not to return to work, and those who as of the cut-off date had transferred permanently to non-stewardess jobs at NWA. We consider each of these arguments separately.

1. *Stewardesses Not Notified of Class Action*

In its February 1971 order, the district court certified the instant case as a class action under *both* Fed. R. Civ. P. 23(b)(2) and 23(b)(3). The court defined the Title VII class as "all female in-flight cabin attendants currently employed by [NWA] and/or employed by [NWA] any time since July 2, 1965." 321 F. Supp. at 1043.

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the lower federal courts in shaping equitable decrees to implement fully the paramount Title VII "make whole" principle.

Thereafter, two rounds of notices were sent to class members, in 1971 and 1972, pursuant to the requirements of Fed. R. Civ. P. 23(c)(2).

The district court, in its *1974 Remedial Order*, again defined the term "Title VII plaintiff(s)" to include "all female cabin attendants employed by [NWA] at any time on or after July 2, 1965, excluding only those who filed timely written elections with this Court to be excluded from this lawsuit in its entirety." 374 F. Supp. at 1384. In its appeal from this order in *Laffey I*, NWA did not challenge the foregoing definition of the class on the grounds it now advances. NWA did, however, challenge the inclusion of stewardesses whose employment with NWA was terminated prior to the ninetieth day preceding the first filing with the Equal Employment Opportunity Commission ("EEOC"). The *Laffey I* court agreed, and directed the district court to exclude this group of ex-employees from the class. *See infra* section III. C.2. On remand, the district court corrected its earlier error (and another, minor mistake as to the actual date of the first EEOC filing). It redefined the Title VII class to include only stewardesses who were employed by NWA on or after January 29, 1970. Employees terminated prior to this date were to be included only on a showing of certain extenuating circumstances. This redefinition was reflected in the district court's Order Respecting Computation of Backpay and Implementation of Final Judgment, November 30, 1982.[21] Thus, NWA had scrutinized the Title VII class definition at the time of *Laffey I*.

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[21] The 1982 Order defines the Title VII class as "all female cabin attendants employed by the Company at any time on or after January 29, 1970 (and certain other female cabin attendants who are to be treated as eligible . . . by reason of detrimental reliance on certain class notices), except for those female cabin attendants who filed timely written elections . . . to be excluded . . . ." J.R.E. 202.

Seeking to avoid waiver and law of the case obstacles to appellate review, NWA claims, in effect, that it was not on notice at the time of *Laffey I* that the district court would include in the class stewardesses never furnished the requisite notice or opportunity to opt out under Rule 23(b)(3). NWA interprets the district court's refusal to exclude those stewardesses who had not received notice of the class action, J.A. 168, as dependent upon the district court's view that the parties and the court had shared, as of the time of the 1971 and 1974 orders, "the intent and understanding" that the definition of the Title VII class adopted therein was broad enough to encompass the disputed group of stewardesses. NWA Brief at 56-57.

NWA argues that there was no such "understanding" between the parties, and claims that it "proceeded to trial with the understanding that the backpay class had been fixed by the universe of cabin attendants to whom notice was sent." NWA Brief at 57. It further argues that the December 1980 order was improper, inasmuch as Rule 23(c)(1) permits a court to "alter" a class certification only prior to the decision on the merits. NWA perceives here the evil of "one-way intervention."

Appellees, on the other hand, heatedly dispute NWA's claim as to the original "understanding" that the Title VII class did not include the disputed group of stewardesses. Appellees cite to substantial portions of the record as support for the true "understanding" of an open-ended class.[22] Under appellees' theory, NWA had full knowledge of the manner in which the class definition would be applied and thus waived the arguments now advanced here because it did not assert those contentions in the proceedings leading up to the *1974 Remedial Order*

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[22] Appellees' Reply Brief at 60-62 (discussing appellees' argument to district court regarding the December 1980 order, R. 31 at 5-12).

or in its appeal to this court in *Laffey I*. Appellees further argue that *Laffey I* established the open-ended class definition as the law of the case, which, as an additional ground, bars NWA from now attacking inclusion of the disputed group of stewardesses.

Without deciding whether the parties had the disputed "understanding" as to the meaning of the 1971 definition of the Title VII class, we conclude that NWA's attack on the 1980 order (and definition) is barred by the doctrines of waiver and law of the case. We reach this conclusion in light of the fact that the *1974 Remedial Order*, issued long after the 1972 cut-off date now urged by NWA, contained essentially the same open-ended class definition as the 1971 certification order. NWA knew, or should have known, that the express terms of the 1974 order—sweeping into the class "all female cabin attendants employed by [NWA] *at any time* on or *after July 2, 1965*" (emphasis added)—could manifestly be read as extending beyond 1972. It was up to NWA to test the meaning of the 1974 order as to stewardesses who had not received notice of the class action, if it so desired, in its appeal from that order—the appeal which culminated in *Laffey I*. NWA failed to do so. NWA, albeit represented now by different counsel, must be held to have waived the opportunity to raise this issue. For the reasons stated *supra* at pp. 33-34, we must recognize the law of the case established in *Laffey I*.

In addition, we note that NWA's argument regarding the impropriety of "one-way intervention" has been rejected by other courts which have held that "classwide backpay under Title VII can be awarded in a [Rule 23] (b)(2) class action."[33] This development in Title VII

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[33] Appellees' Reply Brief at 63-64 (citing, *inter alia*, *Paxton v. Union National Bank*, 688 F.2d 552, 563 (8th Cir. 1982), *cert. denied*, —— U.S. ——, 103 S. Ct. 1772 (1983); *Alexander v. Aero Lodge No. 735, Intern. Ass'n*, 565 F.2d 1364, 1372 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978);

law, signalled by the Fourth Circuit's 1971 decision in *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971), was well under way as of NWA's appeal in *Laffey I*. Had NWA wished to clarify the definition of the Title VII class in relation to this expansion of (b)(2) actions, it clearly had the opportunity to raise the issue in *Laffey I*.[34]

2. *Former Stewardesses*

In *Laffey I*, NWA argued that the district court erred, in its *1974 Remedial Order*, "in granting relief pursuant to Title VII in the form of backpay to stewardesses whose employment with [NWA] [had] terminated more than ninety days prior to the first filing by an employee of [a] . . . charge with the Equal Employment Opportunity Commission." 567 F.2d at 472. NWA's argument was based upon the settled rule that "only those employees who could have filed charges with the Commission individually when the class filing was made are properly members of the . . . class." *Id.* NWA reasoned that the discrimination in this case "could not be deemed continuing as to those who left [NWA's] employ more than ninety days prior to the class filing with the [EEOC]," *id.* at 473, and that, as a result, those employees were not entitled to recover as members of the Title VII class.

The *Laffey I* court agreed with NWA's contention in this respect:

> A severing of the employment relationship ordinarily terminates a discrimination against the severed employee, and activates the time period for filing charges with the Commission concerning any

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Robinson v. Lorillard Corp., 444 F.2d 791, 801-02 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

[34] In light of our conclusion in this respect, we do not have to reach, nor do we, the specific question addressed in decisions from other Courts of Appeals, such as *Lorillard*.

> violation which occurred at separation or which may have been continuing up to the date thereof. To hold otherwise would effectively read the timely-filing requirement out of the statute.

Id. (citations omitted). Accordingly, the *Laffey I* opinion directed the district court, on remand, to "exclude from the Title VII recovery those employees whose connection with NWA was dissolved more than ninety days before the class filing with the [EEOC]," while retaining those terminated stewardesses "who would have brought themselves within the Equal Pay Act class . . . ." *Id.* at 476.

After remand, NWA then sought the exclusion of two *additional* groups of ex-stewardesses: those on leaves of absence on the 90th day prior to the filing of the first EEOC charge and who, subsequent to that date, left the employ of NWA without having returned to work as stewardesses; and those who were employed by NWA at least until the 90th day prior to the first EEOC filing, but who had transferred to non-stewardess positions. The district court denied NWA's requested exclusions in an order dated June 6, 1980. J.R.E. 162. This denial was based on the district court's understanding that *Laffey I* had resolved this issue. *See* District Court's Order of February 19, 1981, denying reconsideration of its June 6, 1980 order. J.A. 172, 173.

NWA challenges the June 6, 1980 order, arguing that the district court misunderstood *Laffey I*. Downplaying the fact that *Laffey I* dealt explicity only with terminated stewardesses, NWA claims that a truer indication of that court's mandate was its recognition that "only those employees who could have filed charges with the Commission individually when the class filing was made are properly members of the litigating class." 567 F.2d at 472. This language, NWA argues, empowered the district court to consider its claims that certain stewardesses, other than those in the terminated group expressly dealt

with in *Laffey I*, had no viable claims allowing their inclusion in the class. NWA traces the district court's failure to so interpret the mandate of *Laffey I* to its overly "wooden reliance" on the "phrase 'left the Company's employ . . . .'" NWA Brief at 61.

Without reaching the merits of NWA's arguments against inclusion of the two disputed groups of stewardesses, we hold that the district court correctly construed the *Laffey I* mandate. NWA had the opportunity in *Laffey I* to raise the issue of the status of these two additional groups of class members, just as it had the opportunity to raise the issue of the terminated stewardesses. NWA simply and indisputably failed to do so. Its failure to raise these arguments constituted a waiver of them. *See supra* at pp. 33-34. Moreover, as to the law of the case, in *Laffey I* the court "affirm[ed]," 567 F.2d at 478, the award of backpay to all class members except those "whose connection with [NWA] was *dissolved* more than 90 days before the class filing with the Commission." *Id.* at 476 (emphasis added). NWA's attack on the district court's December 1980 ruling is thus barred by the principles of waiver and law of the case.

IV. The Limitation Period on Title VII Backpay

In the 1972 amendments to Title VII, Congress limited back-pay liability to no more than two years prior to the filing of charges with the Equal Employment Opportunity Commission. *Laffey I* held that the 1972 amendments did not apply to this case and directed the district court on remand to "determine the local statute of limitations most appropriate to this case," 567 F.2d at 469. On remand, the district court referred to District of Columbia law, noted that the District has no borrowing statute and generally applies its own statute of limitations as a "procedural" prescription, and determined that the most relevant statutes are the D.C. Minimum Wage Law, D.C. Code Ann. § 36-416 (1973) (now codified at D.C. Code

Ann. § 36-216 (1981)), and the general statute of limitations, D.C. Code Ann. § 12-301 (1981). *See Laffey v. Northwest Airlines, Inc.*, 481 F. Supp. 199, 200-01 (D.D.C. 1979). Both of these laws provide for a three-year limitations period.

Were we writing on a clean slate, we might well decide that the two-year rule specified in the 1972 Title VII amendments should apply, if not directly, then at least by analogy, as the best indicator of the federal legislators' view of the appropriate back-pay liability limitation period. We are reluctant, however, to depart from the law of the case on the nonretroactivity of Title VII's current two-year limitation. Nevertheless, we modify the district court's decision specifying a three-year period borrowed from the District of Columbia's minimum wage law or general statute of limitations. In the unique circumstances presented here, we hold that the time frame most appropriately borrowed is Minnesota's two-year limitation on "the recovery of wages . . . under any federal or state law." Minn. Stat. Ann. § 541.07(5) (West Supp. 1982-1983).

Absent a federal limitation period which we can apply, we generally borrow the limitation period of the state in which the federal trial court sits. If a traditional statute of limitations were needed here, we would be required to employ a District of Columbia statute of limitations. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n.29 (1976); *Forrestal Village, Inc. v. Graham*, 551 F.2d 411, 413 (D.C. Cir. 1977). However, what is at issue is not a statute of limitations in the usual sense but rather a substantive cap on the amount of backpay that may be awarded.

Having refused to apply the federal two-year limit, *Laffey I* stated:

> [T]he problem at this point is simply that of fashioning a federal common law period of limita-

> tions. Most often this is effected by adopting the period prescribed by the most analogous state statute. . . . [A]doption of the state limitation period is proscribed only when it would create important conflicts with the federal policy underlying the cause of action or when it would amount to a discriminatory restriction of a federal right of action. Neither of those conditions exists here.

567 F.2d at 468-69 (footnotes omitted). The current two-year federal statutory cap on recovery, 42 U.S.C. § 2000e-5(g), for which *Laffey I* wished to find a "federal common law" substitute, is not addressed, as a statute of limitations would be, to the timeliness of the filing of charges or the institution of a lawsuit. Timeliness of filing with the Commission is governed by section 2000e-5(e) and that of the institution of a lawsuit by section 2000e-5(f)(1). But when those provisions are satisfied by timely filings, and when a plaintiff has made his substantive case, section 2000e-5(g) comes into play for the first time to define the maximum remedy. As the court stated in *Miller v. Miami Prefabricators, Inc.*, 438 F. Supp. 176, 181 (S.D. Fla. 1977):

> When measured against the broad "make whole" purposes of Title VII it becomes evident that the two year cap on back pay contained in 42 U.S.C. § 2000e-5(g) is not a statute of limitations. Rather, that provision was inserted by Congress in an attempt to limit the back pay which could be recovered from employers who have been engaged in discrimination for many years.

As a limit on liability rather than a statute of limitations, section 2000e-5(g) is a substantive rather than a procedural measure. Where there is no similar back-pay cap in state law, a state statute of limitations will be used for federal purposes, here a substantive purpose. Where the issue is substantive, the District of Columbia does not automatically apply its own prescription. *See In re Air Crash Disaster at Washington, D.C.*, 559 F. Supp. 333,

341-42 (D.D.C. 1983); *Williams v. Williams*, 390 A.2d 4, 5 (D.C. 1978).

In this case, we have been pointed to no jurisdictions other than Minnesota and the District of Columbia that have a relevant connection to the parties and actions involved in this litigation.[35] The District of Columbia is obviously a jurisdiction whose laws should be examined. But of the two conceivably applicable D.C. statutes, neither manifests a policy closely analogous to the one at stake here. The Minimum Wage Law, D.C. Code Ann. §36-203, on which the district court relied, is not designed to prevent sex discrimination but rather to establish minimum hourly wages, maximum hours, and overtime compensation rates. That statute's three-year limit on minimum wage claims, D.C. Code Ann. §36-216, seeks merely to prevent the prosecution of stale claims—a policy not implicated here. Likewise, the D.C. three-year "catch-all" statute of limitations, D.C. Code Ann. § 12-301, on which the district court also relied, serves to limit the bringing of stale claims and evinces no particular interest in preventing sex discrimination.

Minnesota law is more to the point and there is no doubt that the parties and actions at issue touch and concern that state. Appellant is a Minnesota corporation; appellant's headquarters are in Minnesota; the wage scales challenged in this case were all set by collective

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[35] Appellees contend that neither state has a governmental interest or statutory policy that is relevant because this is a federal claim that no state has any legitimate interest in regulating substantively. But at the time of *Laffey I* there was a federal limit on liability and this court, though it found the federal limit itself inapplicable, did not decide that backpay should be awarded back to the effective date of Title VII, as appellees here then contended. Instead, *Laffey I* found that federal policy required that a relevant state limitation should be found. The state does not regulate the federal claims; the federal common law does, and it does so by constituting itself from analogous state law.

bargaining agreements negotiated and signed in Minnesota; the employment relationship of every member of the appellee class was established in Minnesota and was controlled by decisions taken there; all interviews and hiring occurred in Minnesota; the employment contract of each appellee class member stated that it was to be "viewed as a Minnesota contract of employment governed by the laws of that state in every respect"; and, when this case was certified as a class action, notice was directed to 2,634 stewardesses, of whom only ten lived in the District of Columbia while 1,694 lived in Minnesota. *See* Declaration of James A. Abbott, R. 61 at ¶¶ 2-4.

In contrast to the District of Columbia, Minnesota does have a statute closely analogous to Title VII, *i.e.*, the Minnesota Human Rights Act, Minn. Stat. Ann. § 363.01 (West 1983). Like Title VII, the Minnesota Human Rights Act extends its protection beyond sex-based classes to other groups and prohibits discrimination in aspects of employment besides compensation. The Minnesota Equal Pay Act that appellant would have us adopt merely prohibits wage differentials and protects only sex-based groups. Minn. Stat. Ann. § 187.67 (West 1983). Significantly, the Minnesota Supreme Court, in discussing the Minnesota Human Rights Act, has applied case law interpreting Title VII. *See Brotherhood of Railway & Steamship Clerks v. State*, 303 Minn. 178, 188-91, 229 N.W.2d 3, 9-11 (1975).

The Minnesota Supreme Court has decided that Minn. Stat. Ann. § 541.07(5) (West Supp. 1982-1983) is the statute of limitations that should govern claims of discrimination brought under the Human Rights Act. *See Brotherhood of Railway & Steamship Clerks*, 303 Minn. at 195-96, 229 N.W.2d at 13-14. Section 541.07(5) prescribes a two-year limitations period "for the recovery of wages or overtime or damages, fees or penalties accruing under any federal or state law respecting the payment of wages or overtime or damages, fees or penalties. . . ."

We find that the limitations period for recovery of back-pay should be established by recourse to that statute. Accordingly, the recovery period is two years.

V. THE LIQUIDATED DAMAGES AWARD

The district court's 1974 Remedial Order, 374 F.Supp. at 1390, disallowed liquidated damages under the Equal Pay Act. On appeal in *Laffey I*, we "remand[ed] the matter of liquidated damages in toto for reconsideration by the District Court." 567 F.2d at 466 n.279. With our *Laffey I* instructions as its guide, the district court permitted further discovery and ultimately found that the relevant facts mandated a liquidated damages award. *Laffey v. Northwest Airlines, Inc.*, 24 Empl. Prac. Dec. (CCH) ¶ 31,384 (D.D.C. Nov. 21, 1980) [hereafter, *Nov. 21, 1980, Decision*]. NWA contends that the district court erred in finding liquidated damages mandatory and in calculating the amount of the award. We reject both contentions as insubstantial and sustain the district court's liquidated damages adjudication in all respects.

A. *Plaintiff's Entitlement to Liquidated Damages*

As *Laffey I* recounted, 567 F.2d at 463-65, the Fair Labor Standards Act, which serves as the procedural and remedial framework for Equal Pay Act claims, initially provided that prevailing employees were entitled to an automatic award of liquidated damages in an amount equal to unpaid wages. Congress amended the statute in 1947 [36] to commit to judicial discretion disallowance or limitation of liquidated damages if the employer satisfies the court that he acted "in good faith" and with "reasonable grounds for believing that his act or omission was [lawful]." 29 U.S.C. § 260 (1982). Both prior to and after this amendment, courts have described liquidated

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[36] *See Laffey I*, 567 F.2d at 463-65 & n.25 (quoting and discussing section 11 of the Portal to Portal Act of 1947, 29 U.S.C. § 260 (1982)).

damages as serving a compensatory, not a penal, purpose. *See, e.g., Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945); *Thompson v. Sawyer*, 678 F.2d 257, 281 (D.C. Cir. 1982); *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982); *Usery v. Chef Italia*, 540 F.Supp. 587, 59[illegible] n.9 (E.D. Pa. 1982).

Initially, the district court concluded that NWA had acted "in good faith": NWA committed a "willful" violation of the Equal Pay Act, the court explained, because it "was fully aware of [the Act] and adopted a deliberate and knowing course of conduct despite its awareness"; but the evidence did not indicate "an intentional, bad faith, attempt [by NWA] to evade the law." *1974 Remedial Order*, 374 F.Supp. at 1390.[37] For several reasons, the district court, on first examination, also found it "not unreasonable" for NWA to believe that its purser/stewardess pay differential was lawful. *Id.*

On review, we held "the reasons given by the District Court for disallowing liquidated damages . . . legal[ly] inadequa[te]." *Laffey I*, 567 F.2d at 465. "The good faith of which the Act speaks," we restated, "is 'an honest intention to ascertain what the . . . Act requires and to act in accordance with it.'" *Id.* at 464 (quoting *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 93 (2d Cir.), *cert. denied*, 346 U.S. 877 (1953)). "Good faith" must be established affirmatively, we observed; it is not enough that "it appear that the employer probably did not act in bad faith." *Laffey I* at 465.

Four of the five reasons supplied by the district court for finding NWA reasonably believed it complied with the

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[37] *See also* Appellant's [NWA] Combined Reply Brief and Brief on Cross-Appeal at 58-59, *Laffey I* (arguing that to rebut NWA's proof in support of its alleged good faith, plaintiffs had to point to "direct evidence of bad faith or deliberate [Equal Pay Act] wrong, or that sex was consciously the rate basis, or that employer was trying to evade the [Equal Pay Act]").

law related to then traditional industry practice and employee acquiescence.[38] We stated: "That an employer and others in the industry have broken the law for a long time without complaints from employees is plainly not the reasonable ground to which the statute speaks." *Id.* (footnote omitted). Further, we remarked that "the prevalence of sex-discrimination litigation against the airline industry naturally prompts the question whether NWA should reasonably have known that neither its own tradition, the industry custom nor the employees' silence was a reliable indicium of the demands of the law." *Id.* (footnotes omitted).[39]

In *Laffey I*, we recognized that "[a]ny assessment of an employer's good faith or grounds for his belief in the legal propriety of his conduct is necessarily a finding of fact, to be disturbed on appeal only if clearly erroneous." 567 F.2d at 464 (footnote omitted). We found, however,

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[38] The fifth factor cited by the district court was "the absence of any clear legal precedent or guideline precisely in point." *1974 Remedial Order*, 374 F.Supp. at 1390. We recognized that this factor was indeed relevant to a determination whether an employer had a good faith, reasonably grounded (but erroneous) belief that his conduct was lawful. But "legal uncertainty," we added, "to assist the employer's defense, must pervade and markedly influence the employer's belief; merely that the law is uncertain does not suffice." *Laffey I*, 567 F.2d at 466. We indicated that on remand it would be appropriate for the district court to consider whether "the absence of precise legal guidelines" was in fact the "condition [that] actually led NWA to believe that it was in compliance with the Equal Pay Act." *Id.* The district court did so and concluded: "[NWA] was in the position to study and know the nature of the work being performed by its employees. For it to erroneously conclude that the jobs were different was not a consequence of *legal* uncertainty." *Nov. 21, 1980, Decision*, 24 Empl. Prac. Dec. at 18,286 (emphasis in original).

[39] *Cf. Laffey I*, 567 F.2d at 466 n.276 (citing Albermarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975) (Title VII decision) for proposition that maintenance of practice of "highly questionable legality" constitutes bad faith).

that the district court had erroneously declared and applied the governing law: it had misperceived the meaning of both "good faith" (by apparently accepting the absence of bad faith as sufficient) and "reasonable grounds" (by considering several factors irrelevant to that determination). The "clearly erroneous" rule, *see* FED R. CIV. P. 52(a), therefore did not stand in the way of a remand.

On this appeal, by contrast, we find no legal infirmity in the district court's assessment. Instead, we are satisfied that the district court closely followed the guidance supplied in *Laffey I*, which constitutes the law of the case and of this circuit. Approaching the district court's fact findings with appropriate regard to that tribunal's function and to the need for finality served by FED. R. CIV. P. 52(a), we have no occasion to disturb the liquidated damages award.

We summarize here the principal points made by the district court, with ample record support, in explanation of its ultimate finding that NWA did not have "a reasonable foundation for a *positive* belief that in fact its policies compl[ied] with the law." *Nov. 21, 1980, Decision*, 24 Empl. Prac. Dec. at 18,286 (emphasis in original). First, NWA officials concluded that the jobs of purser and stewardess were in fact different "without consulting the in-flight supervisors responsible for knowing the duties of each, without commissioning a study of the jobs (as they did nine years later), and without scrutinizing the jobs for differences in duties." *Id.*[40] Next, NWA's

[40] NWA refers to its "thorough" internal review of the possible application of the Equal Pay Act to the Company's personnel practices as indicative of its "good faith" and "reasonable grounds." *See* NWA Brief at 72; *see also Nov. 21, 1980, Decision*, 24 Empl. Prac. Dec. at 18,285-86 (summarizing NWA's contentions). This review consisted of conversations shortly after the Act's passage among Robert Ebert, Vice President for Personnel, James Abbott, Labor Relations Counsel (Personnel Department), and Homer Kinney, Director of

alleged belief that "wages established through collective bargaining" were invulnerable to Equal Pay Act challenge, despite the language of the Act and the Wage-Hour Administrator's published interpretation,[41] could not rest on "an honest intention to ascertain what the Act required." *Id.*

Labor Relations (Personnel Department). *See* 12/20/78 Deposition of Homer R. Kinney at 4-7, *reprinted in* Supplemental Record Excerpts (S.R.E.), Vol. I; 12/19/78 Deposition of James A. Abbott at 56, *reprinted in* S.R.E., Vol. I. No participant asserted that he in fact recalled discussing the differences in duties between pursers and stewardesses. *See* 12/20/78 Deposition of Homer R. Kinney at 4-7, 42-43; 12/19/78 Deposition of James A. Abbott at 56-57, 62-63, 66-67. Nor does it appear that the officials in question were best-positioned to conduct a close review of the work of pursers and stewardesses. *See Laffey I* Joint Appendix at 723-24, 734-36 (trial testimony of Chester L. Stewart) (chain of direct supervision of pursers and stewardesses ran through Department of Transportation Services, not Personnel Department); *id.* at 897 (trial testimony of Robert Ebert) (he had only general, not detailed knowledge of purser and stewardess duties).

[41] The district court quoted and added emphasis to the United States Department of Labor, Wage-Hour Administrator, Interpretive Bulletin on Equal Pay for Equal Work § 800.106 (Apr. 25, 1964), which states:

> [W]here equal work is being performed within the meaning of the statute, a wage rate differential which exists between male and female employees *cannot be justified on the ground that it is a result of negotiation by the union with the employer*, for negotiation of such a discriminatory wage differential is prohibited under the terms of the equal pay amendment.

Reprinted in 29 C.F.R. § 800.106 (1983). The district court appropriately rejected NWA's various attempts to cloud this clear statement. *See Nov. 21, 1980, Decision*, 24 Empl. Prac. Dec. at 18,286 (citing Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658, 663 (4th Cir. 1969)) ("If [employer] did not know, it was because he did not look, or looking, did not see, or want to see what was so plainly there.").

Additionally, NWA could not establish its "good faith" by reason of its termination of "*other* discriminatory personnel practices—after considerable delay and an EEOC finding of probable violations." *Id.* (emphasis in original). Further, NWA gained no mileage from its "purported reliance on an EEOC statement that the duties of the purser and stewardess were different," for the vaunted EEOC statement "merely recited [NWA's] own job descriptions." *Id.* at 18,287. Finally, NWA's actions "*after* the lawsuit was filed . . . fail[ed] to satisfy its burden of showing an honest intention to comply [with the law] prior to commencement of litigation." *Id.* (emphasis in original).[42]

In *Laffey I*, we cautioned the district court that the employer bore a " 'substantial burden' of proving that his failure to comply was in good faith and also was predicated on reasonable grounds for a belief that he was in compliance." 567 F.2d 464-65 (quoting in part *Rothman v. Publicker Indus., Inc.*, 201 F.2d 618, 620 (3d Cir. 1953)) (footnote omitted). "If the employer cannot convince the court in these respects," we emphasized, "an award of liquidated damages remains mandatory." *Id.* at 465 (footnote omitted). The district court, for solid, plainly stated reasons, was unconvinced that NWA acted with the requisite "good faith" and "reasonable grounds." [43]

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[42] Nor, in light of the record as a whole, did NWA's conduct after the commencement of litigation impel any finding that "good faith" and "reasonable grounds" supported NWA's 1970-1976 retention of the sex-based pay differential. *See infra* pp. 52-53 (differential maintained for two years following district court declaration that it violated the Equal Pay Act).

[43] We have described the "good faith" inquiry—did the employer honestly intend to ascertain and act in accordance with Equal Pay Act requirements—as "subjective," and the "reasonable grounds" inquiry as "objective." *Laffey I*, 567 F.2d at 464. If theoretically discrete, the two inquiries are not so readily compartmentalized in practical application. Inquiry into the subjective state of mind of the employer, if we at-

We uphold that determination as free from any clear error.

B. *The Liquidated Damages Calculation*

NWA next argues that, even if the district court properly determined that the statute entitled the Equal Pay Act plaintiffs to liquidated damages, the years 1974 and 1975 should have been left out of the calculation. These are the relevant facts. NWA's contract with the cabin attendants' union expired at the end of 1973. Negotiations for a new contract took place in 1974 and 1975. During that two-year interval, pursers and stewardesses were paid under the terms of the expired contract, which accorded higher pay to pursers. The new contract, signed December 20, 1975, equalized purser and stewardess wage rates [44] and provided for a retroactive adjustment covering the negotiation period.

Thus, in early 1976, the stewardesses received "retropay" for the difference between wages paid pursers and

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tribute rationality to that employer, is likely to be influenced by the fact trier's perception whether a reasonable person, diligently seeking to conform his or her conduct to legal requirements, might have acted as the employer in fact did.

NWA now argues for rigid separation of "good faith" from "reasonable grounds" and incorrectly reads our *Laffey I* opinion to leave untouched the district court's original finding of good faith. *See* NWA Brief at 20, 72 n.*. We note, however, that NWA itself has exhibited less than perfect consistency in deciding whether to characterize a factor as relevant to "good faith" or to "reasonable grounds." *Compare* Appellant's [NWA] Combined Reply Brief and Brief on Cross-Appeal at 54-55, *Laffey I* (arguing that collective bargaining history and stewardess acquiescence demonstrated NWA acted in good faith), *with* NWA Brief at 72 n.* (arguing that, when *Laffey I* rejected these factors, the court addressed only "reasonableness," not "good faith").

[44] This contract, effective January 31, 1976, and applicable to the years 1974-1977, merged all cabin attendants into a single classification. *See* NWA Brief at 11 n.*.

stewardesses in 1974 and 1975. The parties agreed on subtraction of this retro-pay from NWA's basic backpay liability. NWA unsuccessfully sought credit for the retro-pay against liquidated damages as well, and now challenges the district court's refusal to subtract the retro-pay from the liquidated damages award. *See Laffey v. Northwest Airlines, Inc.*, No. 2111-70, slip op. at 1, 4-10 (D.D.C. Oct. 25, 1982) [hereafter, *Oct. 25, 1982, Mem. Op.*], *reprinted in* J.R.E. 180, 183-89.

In opposing credit for the retro-pay against liquidated damages, plaintiffs relied on the district court's November 1973 Findings, 366 F.Supp. at 789, holding that the purser/stewardess pay differential violated the Equal Pay Act.[45] Retroactive adjustment over two years later, plaintiffs argued and the district court agreed, did not relieve NWA of its liquidated damages liability for the years 1974 and 1975, a period during which pursers received, but stewardesses continued to await, the higher pay. NWA, on the other hand, maintained that the retro-pay stewardesses received in 1976 should be treated for all Equal Pay Act remedial purposes as if it had been paid in 1974 and 1975. NWA characterized payments under 1973 contract as merely "on account"; lump-sum adjustments retroactively establishing actual wage rates for past years, NWA stressed, were a "standard feature of labor agreements in the airline industry." *See Oct. 25, 1982, Mem. Op.* at 6, *reprinted in* J.R.E. 185 (quoting NWA); NWA Brief at 22, 82.

We conclude that the district court appropriately refused to "relate back" the retro-pay, and thereby exclude 1974 and 1975 from the liquidated damages calculation. The wages involved in fact were not received until two

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[45] The district court's April 1974 Remedial Order, 374 F.Supp. at 1385, provided that backpay would continue to accrue until NWA equalized purser and stewardess wages. This Order was stayed pending NWA's appeal, petition for rehearing, and petition for certiorari. *See supra* p. 4.

years after they were earned. That reality, in the circumstances here presented, is dispositive of plaintiffs' statutory entitlement to liquidated damages.

In rejecting NWA's "relate back" argument, the district court stressed this central consideration: "liquidated damages are not punitive"; they are intended to compensate employees for a payment delay "which might result in damages too obscure and difficult of proof" to be redressed by any other means. *Oct. 25, 1982, Mem. Op.* at 6-7, *reprinted in* J.R.E. 185-86 (quoting language appearing in *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 583-84 (1942)); *see* cases cited *supra* p. 47. As its principal ground of objection to the district court's ruling,[46] NWA asserts that section six of the Railway Labor Act, 45 U.S.C. § 156 (1982), obligated it to maintain the status quo as to all conditions of employment, including wages, during the two-year

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[46] The district court correctly observed, *see Oct. 25, 1982, Mem. Op.* at 6-7, *reprinted in* J.R.E. 185-86, that the right to liquidated damages is nonwaivable by employees, *see* Schulte v. Gangi, 328 U.S. 108, 114 (1946); Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 704 (1945), and that a union, in collective bargaining, cannot surrender rights secured by the Equal Pay Act. *See* 29 U.S.C. § 206(d)(2) (1982); EEOC v. AT&T Co., 365 F.Supp. 1105, 1128 (E.D. Pa. 1973), *aff'd in relevant part*, 506 F.2d 735 (3d Cir. 1974) (without discussion of this point). Thus airline industry collective bargaining patterns, *see supra* p. 53, provide no insulation to NWA against the full measure of recovery Congress specified for Equal Pay Act violations.

We further note our agreement with the district court's remarks on a Fair Labor Standards Act regulation cited by NWA, 29 C.F.R. § 778.303 (1983) (employer who grants retroactive pay increase must also increase overtime pay retroactively). This regulation serves to insure employees' receipt of overtime compensation on retroactive pay increases; it is not addressed to situations involving an "underlying unlawful differential in wages" or any other delinquency in meeting statutory obligations. *See Oct. 25, 1982, Mem. Op.* at 8-9, *reprinted in* J.R.E. 187-88.

pendency of contract negotiations.[47] That Act, we are confident, does not stop an employer from immediately equalizing wages upward in accordance with a judicial determination that an existing wage disparity violates the Equal Pay Act.[48]

The Railway Labor Act provision NWA cites fosters bargaining over disputes to avert the disruption of commerce strikes and lockouts occasion. *See, e.g., Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union*, 396 U.S. 142, 148-50 (1969). But the Equal Pay Act *requires* equalizing the wages of the lower paid sex up to the level of the higher paid sex. *See, e.g., Corning Glass Works v. Brennan*, 417 U.S. 188, 206-07 (1974). A court determination of an Equal Pay Act violation leaves nothing for the employer and union to bargain

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[47] The provision on which NWA relies states that "[i]n every case where [the negotiation procedures of the Act have come into play], rates of pay, rules, or working conditions shall not be altered by the carrier [until the Act's negotiation procedures have run their course]." 45 U.S.C. § 156 (1982).

[48] We note in this context the specific command directed to unions in the Equal Pay Act:

> No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of [the Equal Pay Act].

29 U.S.C. § 206(d)(2) (1982). *See also, e.g.*, Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235, 249-53 (1970) (to advance objectives of other legislation, court may sanction exception to Norris LaGuardia Act that does not undermine that Act's purposes); Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R., 353 U.S. 30, 39-42 (1957) (same); Brotherhood of Railway, Airline & Steamship Clerks v. REA Express, Inc., 523 F.2d 164, 168-69 (2d Cir. 1975) (Railway Labor Act's unilateral wage change prohibition does not block trustee's unilateral change made to keep bankrupt operating), *cert. denied*, 423 U.S. 1017 (1975), 423 U.S. 1073 (1976).

about. Just as the National Labor Relations Act's prohibition against an employer's unilateral change in wages under negotiation [49] gives way to commands for an employer's compliance with other laws,[50] so the analogous provision of the Railway Labor Act erects no obstacle, on the facts here presented, to an employer's immediate payment of equal wages to men and women performing equal work.

Stewardesses did not receive until 1976 pay made to pursers in 1974 and 1975; NWA must now compensate for the withholding period, during which it remained out of compliance with the Equal Pay Act, by paying the liquidated damages ordered by the district court.

VI. Issues Raised by Laffey as Cross-Appellant

A. *Pre-Act Longevity*

In calculating the amount of backpay due for NWA's post-Act wage violations, the district court held that the women should receive credit only for stewardess service performed subsequent to the Act under which they were recovering. The district court reasoned that the Supreme Court's decisions in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), and *International Brotherhood of Team-*

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[49] *See, e.g.*, NLRB v. Katz, 369 U.S. 736, 743, 745-47 (1962) (employer's unilateral change in wages under negotiation violates § 8(a)(5) of the National Labor Relations Act).

[50] *See* Standard Candy Co., 147 NLRB 1070, 1073 (1964) (ALJ opinion adopted by Board) (unilateral change in wages to comply with Fair Labor Standards Act does not violate § 8(a)(5) of the National Labor Relations Act); Southern Transport, Inc., 145 NLRB 615, 617-18 (1963) (Board opinion) (same); *cf.* EEOC v. AT&T Co., 365 F.Supp. 1105, 1129 (E.D. Pa. 1973) (unilateral changes in provisions of currently binding contract to conform with Title VII or Equal Pay Act do not violate National Labor Relations Act), *aff'd in relevant part*, 506 F.2d 735 (3d Cir. 1974) (without discussion of this point).

sters v. United States, 431 U.S. 324 (1977), precluded crediting the women with pre-Act longevity. Because we find that the district court improperly applied these decisions, we reverse.

The back-pay recovery period covers the years 1967 through 1976. During that time NWA had a pay ladder for pursers such that salary rose with increased years of service or "longevity." Under this policy a man hired as a purser in 1957 would have accumulated ten years' longevity by 1967 and would have been paid accordingly. The issue facing the district court was whether, for purposes of computing backpay, a woman who had also been hired in 1957 as a cabin attendant and who had worked continuously as such until 1967 should be credited with the same longevity in determining her 1967 salary. Under the district court's holding, the woman in this example would be entitled only to the pay of a purser with three years' longevity if she were recovering under the Equal Pay Act. She would be entitled only to the pay received by a purser with two years' longevity if she were recovering under Title VII.

We think that a woman hired in 1957 should today be credited with the same longevity as a man hired in that year. This does not involve finding that discrimination prior to the passage of the Act was somehow illegal. The stewardesses claim no damages for pre-Act pay differentials, nor could they. Their claim is that their current status be the same as that of men who have the same job characteristics, including job longevity. That claim of equal treatment seems to us required by the law. Indeed, the only case authority we have found dealing expressly with this subject holds squarely that a back-pay award should take into account "the length of service of the employees," including years of service prior to the effective date of Title VII. *Sears v. Atchison, T. & S. F. Ry.*, 645 F.2d 1365, 1378 (10th Cir. 1981), *cert. denied*, 456 U.S. 964 (1982).

United Air Lines, Inc. v. Evans and Teamsters v. United States are not to the contrary. In these cases the Supreme Court held that *bona fide* seniority systems do not violate Title VII even where they perpetuate the effects of prior discrimination. The Court based its decisions on section 703(h) of that Act, which provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a *bona fide* seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . ." Section 703(h), 42 U.S.C. § 2000e-2(h) (1976). These decisions do not apply to cases, such as the present one, where there is no allegation that a seniority system violates Title VII, but only a claim for an appropriate remedy.[51] The distinction between a remedy issue and a violation issue under Title VII was explained in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), and repeated in *United Air Lines, Inc. v. Evans*, 431 U.S. at 559. In *Evans* the Court stated:

> The difference between a remedy issue and a violation issue is highlighted by the analysis of § 703(h) of Title VII in *Franks. As we held in that case, by its terms that section does not bar the award of retroactive seniority after a violation has been proved.* Rather, § 703(h) "delineates which employment practices are illegal and thereby prohibited and which are not." 424 U.S. at 758.

431 U.S. at 559 (footnote omitted) (emphasis added). Clearly, section 703(h) does not preclude the crediting of

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[51] Moreover, the district court did not hold, as appellant argues, that Northwest's longevity system was a bona fide seniority system. Absent such a conclusion, there is no basis whatever for application of the Court's decisions in *Teamsters* and *Evans*.

retroactive pre-Act longevity in the present case. Indeed, *Franks v. Bowman Transportation* highlights this point by stating:

> There is no indication in the legislative materials that § 703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved . . . .

424 U.S. at 761-62.

Having demonstrated that the district court's holding was not required by *Evans* and *Teamsters*, we turn to the affirmative reasons for according pre-Act longevity. To deny women longevity credit for their pre-Act service, when men were given such credit for doing what the court has held to be the same work, would "differentiat[e] between similarly situated males and females on the basis of sex." *Evans*, 431 U.S. at 558. If NWA unilaterally computed the backpay in this way, its action would violate Title VII; *a fortiori*, such a method of calculation is not permissible as part of a judicial remedy. Moreover, such a limited remedy would run counter to the "make whole" purpose of Title VII. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419, 421 (1975). The Supreme Court has stated that Congress' purpose in vesting discretionary powers in the courts to provide relief under Title VII was to "make possible the 'fashion[ing] [of] the most complete relief possible.'" *Albemarle Paper Co.*, 422 U.S. at 421 (quoting section-by-section analysis accompanying Conference Committee Report on the Equal Employment Opportunity Act of 1972). We therefore reverse the district court's ruling on this issue and instruct the court to credit plaintiffs' pre-Act longevity in calculating backpay for the relevant, post-Act time periods.

B. *Interest*

1. *Rate of pre-judgment interest for the 1974-82 period*

In paragraph 19 of its 1974 order, the district court made the following ruling on pre-judgment interest:

> 19. INTEREST—With respect to all monies to be paid under the foregoing provisions of this Order, the Company shall pay six percent interest per annum from the date the violation occurred giving rise to said liability through the date upon which payment is made in accordance with this Order.

1974 Remedial Order, 374 F. Supp. at 1389. In 1974, the district court believed that the judgment it was entering was a final one (R. 7, at 4; R. 115, at 25, 26). The panel in *Laffey II*, however, ruled in 1980 that the 1974 order was not a "final judgment," 642 F.2d 578, 583-84 (1980). This ruling had the effect of extending the pre-judgment period from May 20, 1974 through the entry of final judgment on November 30, 1982.

Following the decision in *Laffey II*, plaintiffs moved for a determination of the pre-judgment interest that should apply to this additional period. Plaintiffs noted that interest rates generally had risen greatly after 1974 and recommended that the rate for each year of the 1974-82 period be 90% of the average prime rate for that year, compounded quarterly. At the hearing on plaintiffs' motion, the district court concluded that its prior ruling should not be revised. We affirm.

We are unpersuaded by plaintiffs' argument that the district court did not make a decision as to the rate of interest that should be awarded from 1974 to 1982. In rejecting plaintiffs' contention, the district judge stated that he had "determined the interest to be awarded without regard to the length of the pre-judgment period." R. 120; *Laffey v. Northwest Airlines, Inc.*, 29 Empl. Prac. Dec. (CCH) 25,330, 25,332 (D.D.C. Oct. 6, 1981). More-

over, the express terms of the 1974 order set no limit on the length of the pre-judgment period. We stress that although the 1974 judgment was ultimately declared non-final, we entertained in *Laffey I* all objections to dispositive rulings that the parties placed before us. *See Laffey II*, 642 F.2d at 584 n.49. We have discussed above the salutary purposes served by the doctrine of the law of the case. According to that doctrine,

> a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation.

1B J. Moore, *Moore's Federal Practice* ¶ 0.404[1] (1983). Reconsideration of a prior decision, unappealed at an earlier stage although the opportunity to do so was present, is justified only in a limited number of circumstances:

> [The law of the case] must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.

White v. Murtha, 377 F.2d 428, 431-32 (5th Cir. 1967). *See also Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1189-90 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *Jennings v. Patterson*, 488 F.2d 436, 441 n.4 (5th Cir. 1974). None of the above criteria for reopening the district court's decision obtains here. We therefore affirm the district court's holding that plaintiffs are entitled to pre-judgment interest at six percent simple for the 1974-82 period.

2. *Post-judgment interest on liquidated damages*

In 1981 the district court held that the law of the case precluded it from awarding post-judgment interest on

liquidated damages. In paragraph 19 of its 1974 order, the district court noted, it had not awarded post-judgment interest on pre-judgment interest. By analogy, it reasoned, that ruling "is fully applicable to liquidated damages since liquidated damages are a substitute for pre-judgment interest" (R. 119, at 2). We do not believe that law of the case settles this issue. Our evaluation of the merits leads us to conclude that plaintiffs are entitled to post-judgment interest on liquidated damages. Consequently, we reverse.

The district court did not award liquidated damages until 1980; it thus had no occasion to decide in 1974—and it did not decide in 1974—whether plaintiffs were entitled to post-judgment interest on liquidated damages. That question did not arise until 1981, following our *Laffey I* decision. Since the district court had not previously decided this question, it was "free to rule thereon as it thought proper." *Salvoni v. Pilson*, 181 F.2d 615, 619 (D.C. Cir.), *cert. denied*, 339 U.S. 981 (1950).

The district court's 1974 ruling refusing to award post-judgment interest on pre-judgment interest does not apply by analogy here, for liquidated damages are not merely "a substitute for pre-judgment interest" (R. 119, at 2). As defined by this court in *Thompson v. Sawyer*, 678 F.2d 257, 281 (1982), liquidated damages are "compensatory, intended to reimburse workers for intangible losses—difficult to prove but nonetheless the very real consequences of unfair wages." Liquidated damages differ in amount and, to some extent, in kind from pre-judgment interest. Inasmuch as the law of the case did not control the question whether post-judgment interest should accrue on liquidated damages, that issue was and is open for determination on the merits.

The federal post-judgment interest statute, 28 U.S.C. § 1961 (1982), provides, in relevant part:

> Interest shall be allowed on any money judgment in a civil case recovered in district court . . . .

This statute has been interpreted to mean that

> once a judgment is obtained, interest thereon is mandatory without regard to the elements of which that judgment is composed.

Perkins v. Standard Oil Co., 487 F.2d 672, 675 (9th Cir. 1973); *see R.W.T. v. Dalton*, 712 F.2d 1225 (8th Cir. 1983). The law requires the awarding of post-judgment interest on all elements of the judgment, including liquidated damages. We therefore reverse the determination below and hold that plaintiffs are entitled to post-judgment interest on liquidated damages.

Conclusion

For the reasons stated, we instruct the district court on remand to (1) allow backpay under Title VII beginning two years, not three years, prior to the filing of the first EEOC charge; (2) credit plaintiffs with pre-Act longevity in calculating backpay due for post-Act service; and (3) allow post-judgment interest on liquidated damages. In all other respects, we affirm the district court's dispositions.

It is so ordered.

APPENDIX B
OPINION OF THE COURT OF APPEALS IN *"LAFFEY I"*

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1791

MARY P. LAFFEY, ET AL

v.

NORTHWEST AIRLINES, INC., APPELLANT

AIR LINE PILOTS ASSOCIATION, NON-ALIGNED PARTY

No. 75-1334

MARY P. LAFFEY, ET AL., APPELLANTS

v.

NORTHWEST AIRLINES, INC.,

AIR LINE PILOTS ASSOCIATION, NON-ALIGNED PARTY

Appeals from the United States District Court for the District of Columbia

(D.C. Civil Action No. 2111-70)

Argued September 9, 1975

Decided October 20, 1976
Amended by Order September 8, 1977

Henry Halladay, with whom *William E. Martin* and *John L. Richardson*, were on the brief for appellant in No. 74-1791 and appellee in No. 75-1334.

Michael H. Gottesman, with whom *Dennis D. Clark*, *Robert M. Weinberg* and *George H. Cohen*, were on the brief for appellants in No. 75-1334 and appellees in No. 74-1791.

Linda Dorian, Attorney, Equal Employment Opportunity Commission of the bar of the District of Columbia Court of Appeals, *pro hac vice*, by special leave of court, with whom *Beatrice Rosenberg* and *Charles L. Reischel*, Attorneys, Equal Employment Opportunity Commission, were on the brief for Equal Employment Opportunity Commission as *amicus curiae*.

Robert S. Savelson and *Donald P. Capuano*, were on the brief for appellee Air Line Pilots Association. *Glenn V. Whitaker* also entered an appearance for appellee Air Line Pilots Association.

A. Andrew Giangreco and *Samuel Borzilleri* entered appearances for appellee Transportation Workers Union.

Before BAZELON, *Chief Judge*, and TAMM and ROBINSON, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: Northwest Airlines (NWA) appeals from a judgment of the District Court [1] declaring certain of its personnel policies violative of the Equal Pay Act of 1963 [2] and Title VII of the Civil Rights Act

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[1] *Laffey* v. *Northwest Airlines*, 366 F.Supp. 763 (D.D.C. 1973); *Laffey* v. *Northwest Airlines*, 374 F.Supp. 1382 (D.D.C. 1974). See also *Laffey* v. *Northwest Airlines*, 392 F.Supp. 1076 (D.D.C. 1975), an adjudication not before us on this appeal.

[2] Pub. L. No. 88-38, § 3, 77 Stat. 56 (1963), 29 U.S.C. § 206(d) (1970). Hereinafter we cite this legislation and in most instances other legislation by reference only to the United States Code.

of 1964,[3] and granting injunctive and monetary relief. The principal practice in issue here is the payment to women employed as stewardesses of salaries lower than those paid to men serving as pursers for work found by the court to be substantially equal. Others are the provision to stewardesses of less desirable layover accommodations and allowances for maintenance of uniforms, and the imposition of weight restrictions upon stewardesses only. In varying respects and degrees NWA challenges findings of fact[4] and conclusions of law[5] on these matters, as well as the propriety of the remedial measures adopted.[6]

On careful review of the extensive record on appeal, we sustain the District Court's adjudications on all substantive questions of statutory infringement. We also uphold most but not all of the court's specifications on relief.[7] Thus we affirm the judgment in part, vacate it in part and remand the case to the District Court for further proceedings.

I. History of the Employment Practices

A. *Stewardess and Purser Positions*

Between 1927 and 1947, all cabin attendants employed on NWA's aircraft were women, whom NWA classified

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[3] Pub. L. No. 88-352, tit. VII, § 701 *et seq.*, 78 Stat. 253 (1964), as amended, 42 U.S.C. § 2000(e) *et seq.* (1970).

[4] See *Laffey* v. *Northwest Airlines*, *supra* note 1, 366 F. Supp. at 763-789.

[5] See *id.* at 789-790; *Laffey* v. *Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1390.

[6] *Laffey* v. *Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1382-1390.

[7] Our discussion takes the following order: in Part I, the history of the employment practices in issue; in Part II, the applicable statutes; in Part III, the Equal Pay Act claims; in Part IV, the Title VII claims; in Part V, the remedial order; and in Part VI, the liability of the unions.

as "stewardesses." [8] In 1947, when the company initiated international service, it established a new cabin-attendant position of "purser," [9] and for two decades thereafter adhered to an undeviating practice of restricting purser jobs to men alone.[10] In implementation of this policy, NWA created another strictly all-male cabin-attendant classification—"flight service attendant"—to serve as a training and probationary position for future pursers.[11] NWA has maintained a combined seniority list for pursers and flight service attendants, on which seniority as pursers accrued to flight service attendants immediately upon assumption of their duties as such, and a separate seniority list for stewardesses.[12] From 1951 until 1967, flight service attendants had a contractual right to automatic promotion to purser vacancies in the order of their seniority.[13]

It was not until 1967, when a new collective bargaining agreement was negotiated, that stewardesses first became contractually eligible to apply for purser posi-

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[8] *Laffey* v. *Northwest Airlines, supra* note 1, 366 F.Supp. at 765 (Find. 6).

[9] *Id.*

[10] *Id.* This bar to access, found in violation of Title VII, *Laffey* v. *Northwest Airlines, supra* note 1, 366 F.Supp. at 789 (Concl. 5), is not contested by NWA on appeal. The company challenges only the finding that the purser and stewardess jobs are intrinsically equal and thus commanding equal salaries even for those stewardesses who might not seek purser status.

[11] *Laffey* v. *Northwest Airlines, supra* note 1, 366 F.Supp. at 765 (Find. 6).

[12] *Id.* at 766 (Find. 13).

[13] *Id.* at 766-767 (Find. 14). A small number of flight service attendants in order to maintain their base location in Hawaii chose not to become pursers.

tions.[14] During negotiations on the issue, NWA, for both the 1967 agreement and another in 1970, rejected an additional union proposal that stewardesses, like flight service attendants, be allowed to progress to purser slots according to seniority, stating that the company "prefers males and intends to have them." [15] The company has also insisted upon the right of "selectivity" in choosing which stewardesses might become pursers, and has imposed other restrictions on stewardesses seeking purser vacancies which had not previously been laid on flight service attendants.[16]

Company policy had been to fill purser openings by hiring "men off the street" and training them for a short time, after which notices of purser vacancies would be posted.[17] Following the 1967 collective bargaining agreement affording stewardesses access to these jobs, however, NWA hired five male purser-applicants with-

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[14] *Id.* at 767-768 (Finds. 23, 24).

[15] *Id.* at 767-768, 778-779 (Finds. 23, 45).

[16] *Id.* at 767-769 (Finds. 23, 24). Stewardesses who bid unsuccessfully for purser positions are permitted a review of the company's action only if they have four years of service for the company "on flights to which a purser has been assigned." The probationary period for pursers has been extended from four to six months. Flight service attendants who become pursers are given credit for their entire service on the purser seniority list, while stewardesses who become pursers receive no seniority credit for their service as stewardess, and are required to go to the bottom of the purser seniority list. Because of an overlap at the upper end of the stewardess salary scale and the lower end of the purser salary scale, senior stewardesses who become pursers will not receive any greater pay as purser for a significant period of time. The District Court found that these requirements were a significant deterrent to stewardess-bidding for purser vacancies. *Id.* at 768-769 (Find. 24). This finding is not challenged by NWA on appeal.

[17] *Id.* at 769 (Find. 27).

out ever posting notices of the vacancies.[18] In 1970, after three years of ostensibly open admission to purser status, NWA had 137 male cabin attendants—all as pursers—and 1,747 female cabin attendants—all but one as stewardesses.[19]

The sole female purser at that time was Mary P. Laffey, who bid for a purser vacancy in 1967, after nine years' service as a stewardess.[20] Although that purser position was scheduled to be filled in November, 1967, processing of her application was delayed assertedly for the reason that NWA needed to administer new tests to purser applicants.[21] These tests had never previously been used in selecting pursers, and during the interim between Ms. Laffey's application and her appointment NWA hired two male pursers without benefit of any tests.[22] Finally, in June, 1968, Ms. Laffey became a purser, but was placed on the bottom rung of the purser-salary schedule and received less than her income as a senior stewardess.[23]

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[18] *Id.* (Find. 28).

[19] *Id.* at 773 (Find. 38). These statistics changed significantly after suit was filed, when NWA began to diversify male-female ratios in different occupations. Some men were placed in the lower-paid categories by demoting pursers and by hiring new male applicants as "stewards"—who were paid at the stewardess rate. *Id.* at 767, 770-771 (Finds. 20, 35).

[20] *Id.* at 769-770 (Find. 29).

[21] *Id.* at 770 (Find. 30).

[22] *Id.*

[23] *Id.* (Finds. 31, 33). A pay decrease for progression from stewardess to purser had been specifically prohibited by the 1967 collective bargaining agreement, which provided:

> No reduction in pay shall be suffered by an employee by virtue of his accepting a purser assignment.

NWA eventually acquiesced and paid Ms. Laffey her stewardess salary rate. *Id.* (Find. 33).

B. *Stewardess and Purser Duties*

On this appeal, NWA does not challenge holdings by the District Court that Title VII was violated by NWA's refusal to hire female pursers.[24] Rather, the appeal

[24] NWA does not contest the conclusions following:

> 3. Northwest Airlines, Inc. has discriminated on the basis of sex in willful violation of the Equal Pay Act, 29 U.S.C. § 206(d)(1), 29 U.S.C. § 255(a), by paying Mary P. Laffey a lower salary as a purser than it pays to male pursers with equivalent length of cabin attendant service. . . .
>
> 5. Northwest Airlines, Inc. has violated Title VII:
>
> (a) By discriminating against females because of their sex in filling purser vacancies from July 2, 1965 to date.
>
> (b) By providing from June 16, 1967 to date that stewardesses who become pursers do not get credit for their stewardess seniority on the purser seniority list, where as male FSA's who have become pursers (both before and after June 15, 1967), get credit for FSA seniority on the purser list. . . .
>
> * * * *
>
> (d) By providing that stewardesses who become pursers are slotted at the bottom of the purser pay scale and thus receive lower salaries than male pursers with equal cabin attendant longevity, thus perpetuating the effects of past discrimination from June 15, 1967 to date.
>
> (e) By changing its procedures and standards for selecting pursers, lengthening the probationary period, denying consideration of purser bids to stewardesses who have not flown with a purser for four years, according automatic preference to junior pursers over senior stewardesses in bidding for purser vacancies, discouraging and attempting to deter stewardesses from bidding on purser vacancies, failing to post notices of all purser vacancies at all cabin attendants bases, from June 15, 1967 to date.

[Continued]

focuses primarily on whether the payment of unequal salaries to stewardesses and pursers, while occupying positions as such, implicates Title VII and the Equal Pay Act. The purser wage scale ranges from 20 to 55 percent higher than salaries paid to stewardesses of equivalent seniority.[25] The Equal Pay Act [26] forbids this pay differential unless greater skill, effort or responsibility is required to perform purser duties.[27] Title VII [28] likewise proscribes inferior sex-based compensation plans for women and, additionally, extends its protection to ban conditions of employment imposed discriminatorily upon women employees.[29]

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[24] [Continued]

> (f) By demoting Mary P. Laffey from purser to stewardess and continuing her as a stewardess, by paying her a lower salary as a purser than it paid male pursers hired as cabin attendants subsequent to her, thus perpetuating the effects of past discrimination.
>
> (g) By imposing a "chain of command" aboard planes under which all male cabin attendants, irrespective of classification or length of service were superior to all female cabin attendants.
>
> (h) By forbidding only female cabin attendants to wear eyeglasses, . . ., to have free choice of luggage, . . . and by imposing a shorter maximum height requirement for female cabin attendants.

Id. at 789-790 (Concls. 3, 5).

[25] *Id.* at 788 (Find. 80).

[26] The relevant portion thereof is quoted at text *infra* at note 90.

[27] We discuss this prohibition, and exceptions thereto, in Part III, *infra*.

[28] The relevant portion thereof is quoted at text *infra* at note 91.

[29] Discussed in Part IV *infra*.

—(1) *Flight Assignments*

In gauging whether NWA's pursers and stewardesses performed equal work, the District Court analyzed in great detail NWA's flight operations and its usage of the three different categories of cabin attendants. NWA flies diverse itineraries, which affect the type of personnel assigned to the flight, and which are categorized by particular terminology. In brief, "pure domestic commercial flights" are regularly-scheduled commercial flights which begin and end in the United States, and do not continue to the Orient.[30] Other commercial flights originate in one city in the United States, fly to an intermediate destination in the United States, and then on to the Orient; and the intra-United States portions of such trips are known as "domestic segments of international flights".[31] "Transpacific commercial flights" are regularly-scheduled flights between Anchorage, Seattle, Honolulu and Tokyo; while "commercial interport flights" are regularly scheduled flights between Tokyo and other Asian cities.[32] "Military air charters" are flights contracted with the United States Government to provide regularly-scheduled military air charter service.[33]

Pure domestic commercial flights are, with some exceptions,[34] served exclusively by stewardesses and flight service attendants.[35] Pursers are ordinarily utilized on interport flights, transpacific commercial flights, domestic

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[30] *Laffey* v. *Northwest Airlines, supra* note 1, 366 F.Supp. at 775-776 (Find. 40).

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] At times, NWA has chosen to utilize pursers on domestic flights. *Id.* at 775-778 (Finds. 40, 41).

[35] *Id.* at 776-778 (Find. 41).

segments of international flights, and on all types of charters, military or otherwise, including pure domestic flights.[36] Since 1967, the company has also maintained a crew of stewardesses with proficiency in one or more foreign languages, who are assigned to certain international flights.[37]

NWA schedules a different cabin-attendant crew on each flight segment; one crew will fly the domestic segment, another will take over for the transpacific link, and still a third is used on the interport portion.[38] Pursers and stewardesses bid separately, according to seniority, for monthly schedules.[39]

—(2) *Overall Evaluation*

Probing beneath the different titles, bidding schedules and salaries, the District Court made extensive factual findings comparing the work actually done by pursers and stewardesses, and held it to be essentially equal when considered as a whole.[40] For example, pursers are assigned to the first-class section of the aircraft, which has a smaller passenger load per cabin attendant and a correspondingly more leisurely work pace as compared with the chores inherited by stewardesses assigned to the tourist-class section.[41] The hourly work load also tends to be greater on the "short hop" domestic schedules than on the longer international flights.[42]

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[36] *Id.*

[37] *Id.* at 778 (Find. 44).

[38] *Id.* at 778 (Find. 42).

[39] *Id.* (Finds. 42, 43).

[40] *Id.* at 775-778 (Finds. 40-78).

[41] *Id.* at 779 (Finds. 49, 50).

[42] *Id.* (Find. 50).

Duties performed do not differ significantly in nature as between pursers and stewardesses. All must check cabins before departure, greet and seat passengers, prepare for take-off, and provide in-flight food, beverage and general services.[43] All must complete required documentation, maintain cabin cleanliness, see that passengers comply with regulations and deplane passengers.[44] The premier responsibility of any cabin attendant is to insure the safety of passengers during an emergency, and cabin attendants all must possess a thorough knowledge of emergency equipment and procedures on all aircraft.[45] All attendants also must be knowledgeable in first aid techniques and must be able to handle the myriad of medical problems that arise in flight.[46] Food service varies greatly between flights, but pursers engage in no duties that are not also performed on the same or another flight by stewardesses.[47] Another important duty—building goodwill between NWA and its passengers—depends on the poise, tact, friendliness, good judgment and adaptability of every cabin attendant, male or female.[48]

—(3) *Domestic and International Flights*

The District Court found that when pursers are scheduled on pure domestic flights, their duties are identical to those of stewardesses functioning as "senior cabin attendants"—the most senior purser, or the most senior stewardess on flights with no purser.[49] A substantial per-

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[43] *Id.* at 779-780 (Find. 51).

[44] *Id.*

[45] *Id.* at 780 (Find. 52).

[46] *Id.*

[47] *Id.* at 781 (Find. 57).

[48] *Id.* (Find. 53).

[49] *Id.* at 786-787 (Find. 71).

centage of NWA's overall utilization of pursers is on pure domestic flights and domestic segments of international flights.[30] Similarly, a substantial percentage of the company's use of pursers is their assignment to military air charter flights.[31] Many pursers fly flights of these types exclusively for months or years at a time.[32]

Although, as NWA argues, after January, 1971, pursers as a group have spent more nights away from home than do stewardesses, the District Court found that these longer trips "do not constitute substantially dissimilar working conditions from those of other cabin attendants":[33]

> More consecutive days away from home also means more consecutive days at home during the month. The preferences of cabin attendants in this regard are highly subjective—some prefer one long trip a month, while others prefer shorter trips; . . . . Because ground time is not counted toward flight time, purser schedules (encompassing longer flights) entail fewer actual hours of work. . . .[34]

—(4) *Documentation Tasks*

With respect to documentation responsibilities, the District Court found that pursers and stewardesses have different, but comparable, duties.[35] Stewardesses alone sell liquor, and are alone required to complete inventory

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[30] *Id.* at 787 (Find. 73).

[31] *Id.* On military air charter flights, all phases of work done by pursers is less demanding than on other flights. There is no class-service, no liquor, and only very simple food service.

[32] *Id.*

[33] *Id.* at 787-788 (Find. 75).

[34] *Id.*

[35] *Id.* at 781-785 (Finds. 58-64).

and sales records, and beverage usage reports.[36] On flights carrying tax-free liquor, customs inventory forms must be completed both by stewardesses and pursers,[37] and all cabin attendants are subject to discipline for error.[38] On all flights, the senior cabin attendant and the senior in tourist—the senior stewardess in the tourist class—must make appropriate entries in the log book,[39] and also prepare an in-flight-service report, seating charts, accident reports and other diverse documents.[40]

Pursers are responsible for administering international quarantine procedures for passengers, crew and cargo.[41] As the requirements vary from port to port, pursers must keep their knowledge current in order to comply with

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[36] *Id.* at 781 (Find. 58). Liquor is provided free of charge in the first-class compartment, where the pursers work. Hence pursers must only complete a beverage-use form.

[37] *Id.*

[38] *Id.*

[39] The log contains a listing of cabin items in need of repair.

[40] See the listing in *Laffey* v. *Northwest Airlines*, *supra* note 1, 366 F.Supp. at 781-782 (Find. 59). There are also various other forms which the senior cabin attendant is required to complete. For example, on flights from mainland United States to Hawaii, the senior cabin attendant, who almost always is a stewardess, must instruct passengers in the completion of an agricultural declaration form, spray the cabin with insecticides and record this information on a "certificate of disinsectization". Only stewardesses and flight service attendants have been regularly scheduled on these flights. On flights between the United States and Winnepeg, stewardesses must oversee completion of Canadian and United States customs forms. The senior cabin attendant also has direct personal responsibility for the safe transfer of passage aliens who transit through the United States without visas, under permission from the Immigration Service—the so-called "TRWOV" passengers. *Id.* at 782 (Find. 60).

[41] *Id.* at 783 (Find. 61).

applicable regulations.[42] These duties, however, are not required on all flights to which pursers are assigned, such as on pure domestic flights on which pursers perform no documentation duties, and on certain domestic segments on which such purser duties are minimal.[43] To boot, pursers are instructed to carry out their international documentation responsibilities at times when no significant passenger service is required, and other cabin attendants perform all other necessary services during those times.[44] The District Court found that "the documentary duties described which are . . . assigned only to pursers involved no greater skill, effort or responsibility than the stewardess job." [45]

—(5) *Stewardess and Purser Responsibilities*

The District Court also examined another general, more intangible, duty advanced by NWA as a factor rendering the purser job different in kind from the stewardess position. The company's cabin service manual states that the senior purser on a flight will always be considered the senior cabin attendant and as such must coordinate the activities of the other attendants, and is to be held "responsible and accountable" for the proper rendering of service on that flight.[46] But the manual further provides that if no purser is scheduled, the most senior stewardess

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[42] *Id.*

[43] *Id.* at 784 (Find. 62). On east-bound segments of domestic flights, pursers need only transport the pouch containing the documents and deliver it to another company transportation agent upon arrival at the aircraft's destination. On west-bound portions of domestic segments of flights from the United States to Tokyo and on interport flights, the documentation duties are more substantial.

[44] *Id.* at 784-785 (Find. 63).

[45] *Id.* at 785 (Find. 64).

[46] *Id.* (Finds. 65-66).

will serve as senior flight attendant and will similarly be charged with coordination of cabin service, although she is accountable only for the conduct of service in the section of the aircraft in which she works, responsibility for the remainder being placed on the senior attendant in the other section of the aircraft."[67]

Senior cabin attendants, be they purser or stewardess, have a number of supervisory duties. These include monitoring and, where necessary, correcting the work of other cabin attendants; determining the times of meals and movie showings; shifting cabin attendants from section to section to balance workloads; and giving pre-departure briefings on emergency equipment and procedures.[68] On large planes, even if a purser in the first-class section is designated the senior cabin attendant, the senior in tourist shoulders these same burdens in her section of the aircraft—overseeing the great majority of passengers and cabin attendants.[69] Stewardesses and pursers alike are subject to disciplinary action if they fail to carry out their "supervisory responsibilities." [70]

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There is, however, no merit system maintained to reward those who "supervise" better than others; all pursers and all stewardesses are on uniform, separate wage scales, regardless of whether—or how well—an individual performs.[71]

NWA asserts that it hired, trained and promoted male pursers in the belief that they would exercise leadership and be "responsible and accountable for the entire cabin

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[67] *Id.* (Find. 66).

[68] *Id.* at 785-786 (Find. 67).

[69] *Id.* at 786 (Find. 68).

[70] *Id.* at 785-786 (Find. 67).

[71] *Id.*

service staff," whereas stewardesses functioning as senior cabin attendants on particular flights would be responsible for coordination of cabin service on the entire flight but would be "accountable" only for the manner of service in their assigned sections of the aircraft.[72] The District Court found that, in practice, this distinction between levels of responsibility and accountability is illusory:

> Only in the purser's formal relationship with the Company does his accountability differ from the non-purser senior cabin attendant and that difference is derived from status rather than as a function of the job. . . .[73]

The court found, moreover, that the senior cabin attendant's duties are not substantially greater than the ordinary cabin attendant's function:

> . . . Cabin service attendants are employed to serve and protect Company passengers. The "Supervisory" functions of senior cabin attendants—whether purser or stewardess—are less important than, and require no greater skill, effort or responsibility, than the other functions assigned to all cabin attendants." [74]

C. *The District Court's Conclusions*

Careful evaluation of the facts comprehensively found led the District Court to conclude that NWA had discriminated against women cabin attendants on the basis of sex, in violation of Title VII and the Equal Pay Act, by compensating stewardesses and pursers unequally for equal work on "jobs the performance of which requires equal skill, effort and responsibility and which are per-

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[72] *Id.* at 786 (Find. 69).

[73] *Id.* NWA has consistently refused to pay stewardesses acting as senior cabin attendants any supplement for their services. *Id.* (Find. 70).

[74] *Id.* (Find. 69).

formed under similar working conditions." [75] More specifically, the court found that NWA had discriminated in "willfull violation" [76] of the Equal Pay Act [77] (a) by paying female stewardesses lower salaries and pensions than male pursers; (b) by providing female cabin attendants less expensive and less desirable layover accommodations than male cabin attendants; (c) by providing to male but not to female cabin attendants a uniform-cleaning allowance; and (d) "by paying Mary P. Laffey a lower salary as a purser than it pays to male pursers with equivalent length of cabin attendant service." [78] All of these same actions were held by the District Court also to be violations of Title VII [79] and the court further held that Title VII violations arose out of other forms of company discrimination, *inter alia*, (a) in filling purser vacancies; (b) in denying to stewardesses who became pursers the same seniority rights and pay given male flight service attendants similarly promoted; (c) in changing procedural requirements for becoming a purser so as to deter female applicants, even after the 1967 agreement; [80] (d) in erecting a "chain of command" on flights under which all male cabin attendants, regardless of seniority or classification, were superior to all females; and (e) in imposing on women alone a ban on eyeglasses, prescribed luggage, and weight and height restrictions.[81]

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[75] *Id.* at 789 (Concls. 2, 4).

[76] *Id.* (Concl. 2).

[77] 29 U.S.C. § 206(d)(1), 29 U.S.C. § 255(a).

[78] *Laffey* v. *Northwest Airlines*, *supra* note 1, 366 F.Supp. at 789 (Concls. 2, 3). Conclusion of Law No. 3, referring specifically to Ms. Laffey, was not appealed by NWA. See note 24 *supra*.

[79] 42 U.S.C. § 2000(e)-2(a).

[80] See text *supra* at note 14.

[81] *Laffey* v. *Northwest Airlines*, *supra* note 1, 366 F.Supp. at 780-790 (Concl. 5). Many of these are not challenged by NWA on appeal.

On this appeal, NWA challenges the District Court's central ruling that disparate compensation for equal work violates Title VII additionally to the Equal Pay Act.[82] It attacks also the court's holding that stewardesses and pursers are entitled to equal pay,[83] and the corollary finding that stewardesses who became pursers were improperly denied credit for their stewardess seniority on the purser seniority list.[84] The company also disputes the court's conclusion that Title VII was violated by its policies regarding cleaning allowances and layover accomodations.[85] Lastly, it objects to the remedial measure adopted by the court to cure the conceded violation as to weight restrictions.[86] These contentions, in turn, we now examine.

II. The Applicable Statutes

By the Equal Pay Act, adopted in 1963 as an addition[87] to the Fair Labor Standards Act of 1938,[88] Congress ordained:

> No employer having employees subject to any provisions of this section[89] shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . .

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[82] See Parts III, IV *infra*.

[83] See Parts III, IV *infra*.

[84] See Parts III, IV *infra*.

[85] See Part IV *infra*.

[86] See Part V *infra*.

[87] Pub. L. No. 88-38, § 3, 77 Stat. 56 (1963).

[88] Act of June 25, 1938, ch. 676, 52 Stat. 1060, as amended, 29 U.S.C. §§ 201 *et seq.* (1970).

[89] NWA employees are unquestionably within the coverage of the Equal Pay Act.

> for equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . .[90]

By Title VII, Congress has also decreed, with exceptions not immediately relevant, that

> [i]t shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[91]

It is by these standards that objections to the substantive features of the District Court's judgment are to be gauged on this appeal.

A. *Interrelationship of the Statutes*

NWA argues that the two statutes, read in *pari materia*, do not authorize monetary relief premised upon both legislative schemes for the same act of paying disparate

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[90] 29 U.S.C. § 206(d)(1) (1970).

[91] 42 U.S.C. § 2000e-2(a)(1).

wages. It is said that while the Equal Pay Act permits a statutory class action to secure equal pay for equal work by employees of different sexes,[92] Title VII's guaranty of nondiscriminatory "compensation" applies only to such minority groups as are not covered by the Equal Pay Act.

NWA further contends that the District Court was inconsistent in finding transgressions of both statutes. The argument in this connection may be summarized briefly. If the purser and stewardess jobs are "equal," and thus support the court's holding of an Equal Pay Act violation, the company's refusal to permit women to become pursers does not deprive them of advancement opportunities—because the jobs are equal—and thus there can be no encroachment upon Title VII. Conversely, if the purser job is superior, there is no infringement of the Equal Pay Act although access to that position has unlawfully been denied to women under Title VII. NWA does not challenge the court's finding that Title VII was dishonored by the exclusion of female employees from the purser position, but the company does contest the conclusion that the comparability of that position and the stewardess position brings the salary differential between pursers and stewardesses into collision with the Equal Pay Act.

We reject these approaches. The District Court's finding that NWA's purser and stewardess jobs are essentially equal in duties and responsibilities is not logically inconsistent with the court's conclusions that NWA impinged on Title VII by blocking the entry of women into the purser category. Although, as the District Court determined, the two jobs require equal "skill, effort, and responsibility" so as to command equivalent salaries under the Equal Pay Act, any statutorily-unexempted sex-based barrier to obtaining a particular job is forbidden by Title VII. Among the options withheld by Title VII from an

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[92] See 29 U.S.C. § 216(b) (1970).

employer are those which "limit . . . or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's . . . sex. . . ." [93] Notwithstanding, NWA classified its cabin attendants more prominently as all-female stewardesses and all-male pursers, and barred women applicants from the ranks of the latter though capable through existing employment and accrued experience with NWA to meet all of its purser-criteria save sex. That plainly was outlawed by Title VII as a sex-founded deprivation of employment opportunities, not the least of which were the superior emoluments which NWA bestowed on the purser position.[94]

Nor do we doubt that the same set of facts may form the basis for redress under both Title VII and the Equal Pay Act if the requirements of each are separately satisfied and the claimant does not reap overlapping relief for the same wrong. Unless foreclosed by the statutory language or history, nothing to rob aggrieved parties of the freedom to select among multiple remedies for separate though concurrent statutory violations is apparent.

Title VII rights are independent of the rights created by other statutes, and where remedies coincide the claimant should be allowed to utilize whichever avenue of relief is desired.[95] This would seem to be the clearer for claimants under Title VII which, as the Supreme Court held in *Alexander* v. *Gardner-Denver*,[96] was intended to

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[93] See text *supra* at note 91.

[94] See Part I *supra*.

[95] See generally, Herbert & Reischel, *Title VII and the Multiple Approaches to Eliminating Employment Discrimination*, 46 N.Y.U.L. Rev. 449 (1971).

[96] 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974).

"supplement, rather than supplant existing laws . . . relating to employment." [97] The Court has also noted that the legislative history of Title VII "manifests a congressional intent to allow an individual to pursue independently his rights under Title VII and other applicable state and federal statutes." [98] During the pre-enactment debates, Congress rejected a proposed amendment which would have made Title VII the exclusive remedy for the unlawful employment practices it covers, and thereby evinced a congressional purpose to leave open other modes of relief available to victims of discriminatory employment practices."[99]

Although Title VII reaches farther than the Equal Pay Act to protect groups other than those sex-based classes and to proscribe discrimination in many facets of employment additional to compensation, nowhere have we encountered an indication that Title VII was intended either to supplant or be supplanted by the Equal Pay Act in the relatively small area in which the two are congruent. On the contrary, we are satisfied that the provisions of both acts should be read in *pari materia*, and neither should be interpreted in a manner that would undermine the other.[100] In *Orr* v. *Frank R. MacNeill & Son, Inc.*,[101] the Fifth Circuit declared that "[t]he sex discrimination provision of Title VII of the Civil Rights

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[97] *Id.* at 49, 94 S.Ct. at 1020, 39 L.Ed.2d at 158-159.

[98] *Id.* at 48, 94 S.Ct. at 1019-1020, 39 L.Ed.2d at 158.

[99] See 110 Cong.Rec. 13650-13652.

[100] *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir.), *cert. denied*, 398 U.S. 905, 90 S.Ct. 1696, 26 L.Ed.2d 64 (1970). See also *Ammons* v. *Zia Co.*, 448 F.2d 117, 119 (9th Cir. 1971) ("both [the Civil Rights Act and the Equal Pay Act] 'serve the same fundamental purpose' . . . ."); *Hodgson* v. *Brookhaven Gen. Hosp.*, 436 F.2d 719, 727 (5th Cir. 1970).

[101] 511 F.2d 166 (5th Cir.), *cert. denied*, 423 U.S. 865, 96 S.Ct. 125, 46 L.Ed.2d 94 (1975).

Act of 1964 must be construed in harmony with the Equal Pay Act of 1963." [102] We agree, and we now so hold.

Moreover, the language of Title VII itself explicitly declares that it is unlawful for an employer to offer an employee discriminatory "compensation . . . because of such individual's . . . sex." [103] the legislative history of Title VII yields no hint that the guaranty of nondiscriminatory compensation was extended only to minority groups not embraced within the Equal Pay Act. Indeed, Title VII refers specifically to the Equal Pay Act and states that a sex-predicated wage differential is immune from attack under Title VII only if it comes within one of the four enumerated exceptions to the Equal Pay Act.[104] This, then, focusses our inquiry once again upon whether the District Court correctly found that the employee-litigants had overcome the factors urged by NWA as proof that the stewardess and purser jobs were unequal, or whether NWA had sustained an affirmative defense under one of the Equal Pay Act's exceptions permitting limited instances of disparate pay for equal work.

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[102] *Id.* at 170-171. See also *Piva* v. *Xerox Corp.*, 376 F.Supp. 242, 246-247 (N.D. Cal. 1974).

[103] See text *supra* at note 91.

[104] 42 U.S.C. § 2000e-2(h) (1970) specifies that

> . . . it shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act].

The exceptions to the Equal Pay Act, by virtue of which unequal salaries may be legally permissible are explicitly set forth in the statute, 29 U.S.C. § 206(d)(i)-(iv) (1970). See text *supra* at note 90.

B. *The Union and the Statutes*

We must pause further to consider a recurrent theme in NWA's attack on the District Court's findings that particular company practices are discriminatory. NWA contends that union negotiations during the discriminatory era when the practices went unchallenged should be considered compelling evidence of an understanding that the stewardess and purser positions were dissimilar and that pursers accordingly deserved higher pay. The Company implies, in essence, that complaining employees should now be estopped from challenging these practices because their union—in which women are dominant—agreed to the wages and conditions of employment now impugned. We are not impressed by this argument.

The judicial function called into play here is not to assess the union's assumptions, but to determine whether the jobs in question were actually equal within the contemplation of the Equal Pay Act.[105] The evidentiary worth of the union's actions as a reflection of its own underlying evaluation of the characteristics of the two jobs is exceedingly weak. Beyond that, the union's agreement to negotiated terms is hardly evidence of an individual member's appraisal of the skills, efforts, and responsibilities essential to performance of the jobs. Particularly is this so where, as here, the union was bound to represent pursers as well as stewardesses,[106] and took on that responsibility at a time when earlier company policy had already created a *status quo* under which pursers were more highly paid than stewardesses. Since the union's obligation thenceforth was to seek pay raises

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[105] *Cf. Hodgson* v. *Brookhaven Gen. Hosp., supra* note 100, 436 F.2d at 724. See also *Brennan* v. *Prince William Hosp. Corp.*, 503 F.2d 282, 288 (4th Cir. 1974), *cert. denied*, 420 U.S. 972, 95 S.Ct. 1392, 43 L.Ed.2d 652 (1975).

[106] *Laffey* v. *Northwest Airlines, supra* note 1, 366 F.Supp. at 765 (Find. 7).

benefiting all its members, it obviously was not in a position to alter substantially the position of one constituent group at the expense of another.[107] And when the union did attempt to win better treatment for stewardesses, it encountered stiff resistance from NWA.[108] The only logical inference from this combination of circumstances is that as a matter of strategy—not attributable to any belief as to the comparability of the two jobs—the union chose to forego a special demand for equality for the stewardesses in order to achieve more pressing bargaining objectives.

More fundamentally, union activity cannot strip individual employees of the opportunity to seek vindication of their statutory entitlements in court. Rights established under Title VII and the Equal Pay Act are "not rights which can be bargained away—either by a union, by an employer, or by both acting in concert." [109] It cannot be gainsaid that NWA played an instrumental role in the negotiations leading to adoption of the discriminatory wage scales,[110] and a collective bargaining agreement perpetuating prior pay discrimination affords the employer no defense to a charge under the Equal Pay Act.[111]

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[107] *Id.* at 767-768 (Find. 23).

[108] *Id.* at 778-779 (Find. 45).

[109] *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799, 21 A.L.R. Fed. 453 (4th Cir.), *cert. dismissed*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971). See also *United States* v. *Bethlehem Steel Corp.*, 312 F.Supp. 977, 989-991 (W.D.N.Y. 1970), *rev'd in part on other grounds*, 446 F.2d 652 (2d Cir. 1971).

[110] See text *supra* at note 108.

[111] In *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 208-210, 94 S.Ct. 2223, 2234-2235, 41 L.Ed.2d 1, 17-18 (1974), the Supreme Court rejected the company's contention that it cured its violation of the Act—caused by paying different wages to day and night inspectors, a masking of a wage system originally based on sex—when a new collective bargaining agree-

We hardly need to mention that if the union also contributed to the discriminatory scheme, the claimant has a cause of action against the union as well.[112]

III. The Equal Pay Act Claims

As the Third Circuit has said, the Equal Pay Act

> was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it.[113]

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ment went into effect. The new agreement provided for equalization of base wages for newly-hired night and day inspectors but continued to provide unequal base wages for employees hired before its operative date. The Court reasoned that the lower base wage for day inspectors was a "direct product" of the unlawful failure to equalize base wages for male and female employees as of the effective date of the Act. If the company had properly equalized the wage rates on that date, employees hired prior to the new agreement would have received the higher rate. Since the collective bargaining agreement "operated to perpetuate the effect of the company's prior illegal practice of paying women less than men for equal work," it provided no defense to infringement of the Act. 417 U.S. at 209-210, 94 S.Ct. at 2235, 41 L.Ed.2d at 18.

[112] See *Macklin* v. *Spector Freight Sys., Inc.*, 156 U.S.App. D.C. 69, 78-79, 478 F.2d 979, 988-989 (1973), *disapproved on other grounds, Johnson* v. *Railway Express Agency*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975); *Hodgson* v. *Sagner, Inc.*, 326 F.Supp. 371 (D. Md. 1971), *aff'd*, 462 F.2d 180 (4th Cir. 1972).

> Under the Fair Labor Standards Act, no agreement between a company and a union, even if arrived at as a result of collective bargaining negotiations, can be used as a defense by a company to the statutory requirements.

Hodgson v. *Sagner, Inc., supra*, 326 F.Supp. at 375.

[113] *Shultz* v. *Wheaton Glass Co., supra* note 100, 421 F.2d at 265.

And as the Supreme Court has declared,

> Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and *endemic* problem of employment discrimination in private industry—the fact that the wage structure of "many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same. S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963). The solution adopted was quite simple in principle: to require that "equal work will be rewarded by equal wages." *Ibid.*[114]

A. *The Guiding Principles*

An Equal Pay Act claimant must show that her salary was lower than that paid by the employer to "employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." [115] The claimant bears the onus of demonstrating that the work unequally recompensed was "equal" within the meaning of the Act.[116] Once this has been done, the claimant will prevail unless the employer asserts as an affirmative defense that the wage differen-

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[114] *Corning Glass Works* v. *Brennan*, *supra* note 111, 417 U.S. at 195, 94 S.Ct. at 2228, 41 L.Ed.2d at 10 (emphasis added).

[115] See text *supra* at note 90.

[116] See 109 Cong. Rec. 9196 (1963) (remarks of Representative Frelinghuysen); 109 Cong. Rec. 9208 (remarks of Representative Goodell); *Corning Glass Works* v. *Brennan*, *supra* note 111, 417 U.S. at 195, 94 S.Ct. at 2228, 41 L.Ed.2d at 10; *Hodgson* v. *Fairmont Supply Co.*, 454 F.2d 490, 493 (4th Cir. 1972); *Hodgson* v. *Brookhaven Gen. Hosp.*, *supra* note 100, 436 F.2d at 722; *Shultz* v. *American Can Co.-Dixie Prods.*, 424 F.2d 356, 360 (8th Cir. 1970).

tial is justified under one of the four exceptions enumerated in the Act—"(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." [117] If one or more of these defenses is invoked, the employer bears the burden of proving that his policies fall within an exempted area.[118] This interpretation of the procedural mechanics of the Equal Pay Act comports with the construction of other provisions of the Fair Labor Standards Act, of which the Equal Pay Act is a part, by which statutory exceptions and exemptions are considered matters of affirmative defense to be proven by the employer."[119]

One of the more frequent controversies aroused by the Equal Pay Act has involved litigants' attempts to demonstrate that jobs with different titles and descriptions are in reality equal in their calls upon the jobholders. The contest often necessitates an assessment of the significance of differences in job demands advanced by the

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[117] See text *supra* at note 90.

[118] *Corning Glass Works* v. *Brennan*, *supra* note 111, 417 U.S. at 196, 94 S.Ct. at 2229, 41 L.Ed.2d at 11; *Hodgson* v. *Robert Hall Clothes, Inc.*, 473 F.2d 589, 596 (3d Cir.), *cert. denied*, 414 U.S. 866, 94 S.Ct. 50, 38 L.Ed.2d 85 (1973); *Shultz* v. *Wheaton Glass Co.*, *supra* note 100, 421 F.2d at 266; *Shultz* v. *First Victoria Nat'l Bank*, 420 F.2d 648, 654 n.8, 7 A.L.R. Fed. 691 (6th Cir. 1969); *Shultz* v. *American Can Co.-Dixie Prods.*, *supra* note 116, 424 F.2d at 362.

[119] See *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493, 65 S.Ct. 807, 808, 89 L.Ed. 1095, 1098-1099 (1945); *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 456, 4 L.Ed.2d 393, 396-397 (1960); *Walling* v. *General Indus. Co.*, 330 U.S. 545, 547-548, 67 S.Ct. 883-884, 91 L.Ed. 1088, 1090-1091 (1947); *Mitchell* v. *Kentucky Fin. Co.*, 359 U.S. 290, 295, 79 S.Ct. 756, 759, 3 L.Ed.2d. 815, 819 (1959), all cited in *Corning Glass Works* v. *Brennan*, *supra* note 111, 417 U.S. at 197 n.12, 94 S.Ct. at 2229 n.12, 41 L.Ed.2d. at 11 n.12.

employer to show that the jobs are not equal. For "[it] is now well settled that the jobs need not be identical in every respect before the Equal Pay Act is applicable";[120] the phrase "equal work" does not mean that the jobs must be identical, but merely that they must be "substantially equal."[121] A wage differential is justified only if it compensates for an appreciable variation in skill, effort or responsibility between otherwise comparable job work activities.[122]

The Department of Labor has promulgated an extensive series of regulations[123] to guide the "application of the equal pay standard, [which] is not dependent on job classifications or titles but depends rather on actual job requirements and performance. . . ."[124] One regulation states:

> Congress did not intend that inconsequential differences in job content would be a valid excuse for payment of a lower wage to an employee of one sex than to an employee of the opposite sex if the two are performing equal work on essentially the same job in the same establishment.[125]

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[120] *Corning Glass Works* v. *Brennan*, *supra* note 111, 417 U.S. at 203 n.24, 94 S.Ct. at 2232 n.24, 41 L.Ed.2d at 15 n.12.

[121] See, *e.g.*, *Hodgson* v. *Fairmont Supply Co.*, *supra* note 116, 454 F.2d at 493, citing *Shultz* v. *Wheaton Glass Co.*, *supra* note 100, 421 F.2d at 265; *Hodgson* v. *American Bank of Commerce*, 447 F.2d 416 (5th Cir. 1971).

[122] See *Brennan* v. *Prince William Hosp. Corp.*, *supra* note 105, 503 F.2d at 235.

[123] 29 C.F.R. §§ 800.114-800.166 (1975).

[124] 29 C.F.R. § 800.121 (1975).

[125] 29 C.F.R. § 800.120 (1975). See 109 Cong. Rec. 9196 (1963) (remarks of Representative Frelinghuysen); *id.* at 9208 (remarks of Representative Goodell); *id.* at 9761 (remarks of Senator McNamara).

Another points out that "[i]nsubstantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs will not render the equal pay standard inapplicable." [126]

These regulations are entitled to "great deference" by the courts in applying the Equal Pay Act to given factual situations.[127] Courts have consistently held that differences in the duties respectively assigned male and female employees must be "evalauted as part of the entire job." [128] Thus, if in the aggregate the jobs require substantially similar skills, efforts and responsibilities, the work will be adjudged equal despite minor variations.[129]

When there is a disparity between salaries paid men and women for similar positions bearing different titles —such as pursers and stewardesses—the courts have scrutinized the evidence to discern whether the salary differential is justified by heterogeneous duties.[130] Another regulation of the Department of Labor states in relevant part,

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[126] 29 C.F.R. § 800.122 (1975).

[127] See *Hodgson* v. *Corning Glass Works*, 474 F.2d 226, 232 (2d Cir. 1973); *aff'd*, 417 U.S. 188, 94 S.Ct. 2223, 41 L.Ed. 2d 1 (1974); *Brennan* v. *Prince William Hosp. Corp.*, *supra* note 105, 503 F.2d at 287-288 n.5; *Brennan* v. *City Stores, Inc.*, 479 F.2d 235, 239-240 (5th Cir. 1973). See also *National Automatic Laundry & Cleaning Council* v. *Shultz*, 143 U.S.App.D.C. 274, 282, 443 F.2d 689, 702 (1971).

[128] See, *e.g.*, *Brennan* v. *Prince William Hosp. Corp.*, *supra* note 105, 503 F.2d at 290.

[129] 29 C.F.R. §§ 800.126, 800.130(c). See, *e.g.*, *Brennan* v. *Prince William Hosp. Corp.*, *supra* note 105, 503 F.2d at 290-291; *Hodgson* v. *American Bank of Commerce*, *supra* note 121, 447 F.2d at 421-423; *Hodgson* v. *Brookhaven Gen. Hosp.*, *supra* note 100, 436 F.2d at 724-726.

[130] See, *e.g.*, *Hodgson* v. *Brookhaven Gen. Hosp.*, *supra* note 100 ("orderlies" and "nurses aides").

> [i]n determining whether job differences are so substantial as to make jobs unequal, it is pertinent to inquire whether and to what extent significance is given to such differences in setting the wage levels for such jobs. Such an inquiry may . . . disclose that apparent differences between jobs have not been recognized as relevant for wage purposes. . . .[131]

An employer cannot justify a pay differential by mere assumptions on career-orientation, the duration or probable length of working time, or a supposed respect for male authority and leadership.[132] Moreover, "training programs which appear to be available only to employees of one sex will . . . be carefully examined to determine whether such programs are, in fact, bona fide." [133]

An employer must show a consistent pattern of performance of additional duties in order to demonstrate that added duties are genuinely the motivating factor for the substantially higher pay. It is not sufficient that an increased workload might hypothetically have commanded a higher salary if it is not in fact the basis for a significantly greater wage. The employer may not fabricate an

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[131] 29 C.F.R. § 800.122 (1975).

[132] 29 C.F.R. §§ 800.143, 1604(a)(1)(i) (1975).

[133] 29 C.F.R. § 800.148. See also *Hodgson* v. *Behrens Drug Co.*, 475 F.2d 1041, 1046-1047 (5th Cir.), *cert. denied*, 414 U.S. 822, 94 S.Ct. 121, 38 L.Ed.2d 55 (1973); *Hodgson* v. *Security Nat'l Bank*, 460 F.2d 57, 60-61 (8th Cir. 1972) (reversing a lower court decision which ruled that a male-dominated bank management training program was bona fide); *Hodgson* v. *Fairmont Supply Co.*, *supra* note 116, 454 F.2d at 498-499 (reversing a District Court finding which had upheld a sex-based sales training program); *Shultz* v. *First Victoria Nat'l Bank*, *supra* note 118, 420 F.2d at 655-657 (male-dominated "executive training programs" for bank tellers did not constitute a factor "other than sex" which would permit a pay differential where female tellers were never included in the training program).

after-the-fact rationalization for a sex-based pay difference. "[T]he semblance of [a] valid job classification system may not be allowed to mask the existence of wage discrimination based on sex." [134]

Often, evidence superficially purporting to justify greater pay as compensation for added work is found upon close examination to have inconsistencies which render its evidentiary value weaker. Where, for example, all male employees receive greater pay but only some perform the extra tasks allegedly justifying that pay, a reasonable inference is that maleness—not the added chores—is the basis for the higher wage. This is particularly true if the duties are of peripheral importance and the increase in pay is substantial.[135] Moreover, if some women without added compensation render the same extra performance that purportedly justified the pay differential favoring men, the inference becomes even stronger that the duties are irrelevant to the wage setting.[136] Similar evidence of

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[134] *Brennan* v. *Prince William Hosp. Corp.*, *supra* note 105, 503 F.2d at 285-286. See also, *Shultz* v. *Wheaton Glass Co.*, *supra* note 100, 421 F.2d at 265; *Hodgson* v. *Brookhaven Gen. Hosp.*, *supra* note 100, 436 F.2d at 723 n.3; *Hodgson* v. *American Bank of Commerce*, *supra* note 121, 447 F.2d at 422-423; *Shultz* v. *First Victoria Nat'l Bank*, *supra* note 118, 420 F.2d at 655.

[135] *Shultz* v. *Wheaton Glass Co.*, *supra* note 100, 421 F.2d at 263-264; *Hodgson* v. *Fairmont Supply Co.*, *supra* note 116, 454 F.2d at 493; *Hodgson* v. *Behrens Drug Co.*, *supra* note 132, 475 F.2d at 1047; *Brennan* v. *Prince William Hosp. Corp.*, *supra* note 105, 503 F.2d at 285-286; *Hodgson* v. *Miller Brewing Co.*, 457 F.2d 221, 225 n.8 (7th Cir. 1972); *Shultz* v. *American Can Co.-Dixie Prods.*, *supra* note 116, 424 F.2d at 360-362.

[136] See *Brennan* v. *Prince William Hosp. Corp.*, *supra* note 105, 503 F.2d at 288; *Hodgson* v. *Behrens Drug Co.*, *supra* note 132, 475 F.2d at 1047; *Hodgson* v. *Montana State Bd. of Educ.*, 336 F.Supp. 524, 525 (D. Mont. 1972).

discriminatory wage patterns is to be found where women are paid only for the amount of time actually spent on the extra work, but men are uniformly paid at the higher rate regardless of whether or not they are doing the work.[137] Additionally the Fourth Circuit has found corroborative evidence that higher pay is not related to extra duties when "qualified female employees are not given the opportunity to do the extra work." [138] The conclusion to be drawn, when any of these inconsistent patterns exists, is that

> [d]espite claims to the contrary, the extra tasks were found to be makeweights. This left sex—which in this context refers to the availability of women at lower wages than men—as the one discernible reason for the wage differential. That, however, is precisely the criterion for setting wages that the Act prohibits.[139]

B. *The Case at Bar*

Applying these principles to the instant case, we perceive no error in the District Court's conclusion that the alleged differences in occupational duties proffered by NWA to justify the higher wage paid to pursers do not demonstrate that the stewardess and purser jobs are disparate. The court found that there is a uniform pay-scale for pursers which exceeds the pay-scale for stewardesses; and that these contrasting schemes are uncorrelated with

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[137] *Shultz* v. *American Can Co.-Dixie Prods.*, *supra* note 116, 424 F.2d at 360-361.

[138] *Brennan* v. *Prince William Hosp. Corp.*, *supra* note 105, 503 F.2d at 286, citing *Shultz* v. *Wheaton Glass Co.*, *supra* note 100.

[139] *Brennan* v. *Prince William Hosp. Corp.*, *supra* note 105, 503 F.2d at 286, citing *Brennan* v. *City Stores, Inc.*, *supra* note 127, 479 F.2d at 241 n.12 and *Hodgson* v. *Brookhaven Gen. Hosp.*, *supra* note 100, 436 F.2d at 726.

pursers' and stewardesses' respective employment burdens. Pursers flying exclusively on domestic routes with no international documentation obligations are compensated evenly with pursers on international flights,[140] despite the company's insistence that the onus of international flying is one of the explanations of the greater purser salary. To be sure, stewardesses who staff international flights do receive a foreign-flying supplement, but pursers' pay remains 20 to 35 percent larger than that of stewardesses of comparable seniority engaging solely in international travel.[141]

Pursers consistently assigned to flights on which they do not function as the senior cabin attendant receive the same salary as those flying constantly in that capacity,[142] while stewardesses rendering like service derive no supplemental income.[143] A greater mantle of supervisory responsibility supposedly inherent in the position of senior cabin attendant thus does not exonerate the extra compensation awarded pursers. In fact, stewardesses' supervisory labors may exceed those of pursers. The more junior cabin attendants who need more supervision are relegated by the seniority flight-bidding system to the tourist-class section of the least desirable domestic flights, and the probability is that a stewardess acting as senior cabin attendant or senior-in-tourist will be charged with training as well as normal supervision.[144] Pursers, possessing the bidding power to obtain the more popular flights, are positioned in the first-class section with the more senior stewardesses, who require little or no super-

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[140] *Laffey* v. *Northwest Airlines, supra* note 1, 366 F.Supp. at 784-787 (Finds. 62, 63, 70-73).

[141] *Id.* at 788 (Find. 80).

[142] *Id.* at 776-777, 787-789 (Finds. 41, 72, 78-81).

[143] *Id.* at 786 (Find. 70).

[144] *Id.* (Find. 68).

vision.[145] The District Court further found that "a substantial percentage of the Company's overall utilization of pursers consisted of their assignment . . . exclusively, for months or years at a time," [146] to flights on which their functions are "identical" [147] to or "less demanding" [148] than stewardesses' tasks.

In sum, stewardesses are confined to the same lower salaries whether or not flying as the senior cabin attendant, regardless of how taxing the service on their flights may be, and irrespective of the performance of documentation work. Pursers, at all times and under all conditions, received substantially superior salaries.[149] This evidence leads convincingly to the conclusion that the contrast in pay is a consequence of the historical willingness of women to accept inferior financial rewards for equivalent work—precisely the outmoded practice which the Equal Pay Act sought to eradicate.[150]

Nor can NWA reasonably contend that it gives pursers higher salaries because, as a group, they discharge extra duties more frequently than stewardesses, and thus for accounting convenience are recompensed equally. As the District Court found, the company "maintains records which enable it to determine what flight a given cabin attendant has flown each day, the position held each day, and the time spent by that cabin attendant each day." [151] But as the court further found,

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[145] *Id.*

[146] *Id.* at 787 (Find. 73).

[147] *Id.* at 786-787 (Find. 71).

[148] *Id.* at 787 (Find. 72).

[149] *Id.* at 788 (Find. 80).

[150] See text *supra* at notes 113-114.

[151] *Laffey* v. *Northwest Airlines*, *supra* note 1, 366 F.Supp. at 788-789 (Find. 81).

> [t]hese records enable the Company to pay cabin attendants different amounts for different portions of their monthly service. Flight service attendants temporarily filling pursers vacancies are paid the purser rate only while flying as pursers. Stewardesses flying international receive the "foreign flying" supplement only for the hours spent on the international flight. Permanently assigned pursers receive the purser rate . . . whether or not they are filling the purser position on the flight and irrespective of the kind of flight, domestic, foreign or interport. Except for the "foreign flying supplement" all stewardesses of a given longevity receive the same salary, irrespective of the nature of the flights or the position occupied on the flight.[152]

The records would facilitate the ascertainment of differential salaries for dissimilar portions of the monthly service if in fact the activities purportedly justifying the larger salary were really the reason for the added compensation.

It is not legally appropriate to accord stewardesses salary increments only when they serve as the senior cabin attendant. We have pointed to the inconsistencies between occupational tasks and rewards to underscore our conviction that the District Court properly concluded that any greater duties demanded of pursers is not the foundation for their higher pay.[153] In no way does this

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[152] *Id.*

[153] It is argued that pursers are salaried higher because they must function under more onerous working conditions —in that they are confined to a more restricted bidding schedule and are assigned to more foreign flights. However, stewardesses with foreign language proficiency are confined to an even more restricted bidding schedule and yet they are paid at the rate applicable to other stewardesses. *Laffey* v. *Northwest Airlines, supra* note 1, 366 F.Supp. at 778 (Find. 44). And foreign flying stewardesses are assigned to more

detract from the court's finding that the senior-cabin-attendant function was a mission that did not alter the basic equality of all cabin attendant jobs:

> The "supervisory" functions of Senior cabin attendants—whether purser or stewardess—are less

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foreign flights but receive only the same flying supplement that all stewardesses get for any foreign flying. *Id.* Moreover, pursers realize substantially higher pay than do stewardesses engaged in foreign flying. Therefore, NWA cannot justify the increased purser-pay on the basis of more restricted bidding schedules or more extensive foreign flying since stewardesses subjected to these same circumstances are nevertheless paid considerably less.

More importantly, NWA cannot support the higher pay on the ground that pursers and stewardesses perform their jobs under different working conditions. In *Corning Glass Works* v. *Brennan, supra* note 111, 417 U.S. at 202-203, 94 S.Ct. at 2231-2232, 41 L.Ed.2d at 14-15, the Supreme Court defined "working conditions" as a term having a "different and much more specific meaning" than "a layman might . . . assume." Only "surroundings"—such as toxic chemicals or fumes regularly encountered by a worker—and "hazards"—such as those which pose the risk of severe physical injury —are encompassed within the meaning of "working conditions." The District Court's finding that stewardesses and pursers perform under similar working conditions is thus amply supported in the record.

NWA also asserts on appeal that even if the District Court was correct in holding that the jobs of stewardess and purser are equal, at least part of the compensation received by pursers falls within an exception to the Act as payment made pursuant to "a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1)(iv) (1970). NWA contends that one factor other than sex is foreign flying; it points out that since stewardesses on foreign flights get a foreign flying supplement, at least that portion of purser salary rests on a factor other than sex. The counter-argument advanced is that the exception to the Act is an affirmative defense which NWA has waived because it was never pleaded. We need not resolve this issue, however, since even if NWA

> important than, and require no greater skill, effort or responsibility, than the other functions assigned to all cabin attendants.[134]

We cannot say that this finding is clearly erroneous, and it follows that all cabin attendants perform equal work and are legally entitled to places on equal salary scales. Although the senior cabin attendant is "responsible" for the cabin crew during the flight, the Secretary of Labor's regulations define job responsibility in terms of the degree of employee accountability for job performance.[135] At the trial of this case, witnesses testified that both pursers and stewardesses are disciplined substantially less for unsatisfactory performance as senior cabin attendant than for subpar passenger service. And although the company imposes rigorous sanctions on cabin attendants charged with misconduct affecting customer relations, its records disclose only one instance of disciplinary action against a purser for failure to adequately

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properly raised the defense, it has not shouldered its burden of proving it.

The District Court implicitly found that the purser salary is not based on foreign flying, when it found that a "substantial percentage of the Company's overall utilization of pursers consisted of their assignment to pure domestic flights or to the domestic segments of international flights," *Laffey* v. *Northwest Airlines, supra* note 1, 366 F.Supp. at 787 (Find. 73), and that pursers received the same pay regardless of whether they were engaged in foreign flying. *Id.* at 788-789 (Find. 81). Consequently, NWA did not sustain its burden of proving that part of the purser salary was intended as compensation for foreign flying and was not "an added payment based on sex." *Corning Glass Works* v. *Brennan, supra* note 111, 417 U.S. at 204, 94 S.Ct. at 2233, 41 L.Ed.2d at 15.

[134] *Laffey* v. *Northwest Airlines, supra* note 1, 366 F.Supp. at 786 (Find. 69).

[135] 29 C.F.R. § 800.129 (1975), and note the examples, *id.* at § 800.130.

monitor the work of other cabin attendants. This strongly suggests that the provision of high quality service to passengers—exacted of all cabin attendants—is the most important undertaking for which the company compensates pursers and stewardesses. The increased responsibility borne by the more senior personnel in both classifications is rewarded by larger salaries given to those on the upper rungs of the pay ladder, and this will continue with a combined stewardess-purser salary scale.

In a similar case, the Fifth Circuit reversed a finding that a salary differential between male and female bank tellers was justified by the men's supposedly greater managerial role in "supervising the cashing of checks, helping the other tellers balance out, and generally acting as trouble-shooters when unusual or difficult problems arose." [156] The court found it "doubtful at best that such small, insignificant additional duties can ever serve as a justification for the differential evidenced in the Bank's wage figures." [157] We affirm the District Court's findings that NWA purser and stewardess positions are substantially equal within the intent of the Equal Pay Act and demand financial response at the purser-level of recompense.[158]

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[156] *Hodgson* v. *American Bank of Commerce, supra* note 121, 447 F.2d at 422.

[157] *Id.*

[158] Once the stewardess position is found to be equal work to that of purser, not only must access to the job of purser be granted to women, but women who remain stewardesses must also be given pay equal to pursers'. The wage rates for male employees cannot be reduced to achieve equality, because the proviso to 29 U.S.C. § 206(d)(1) insures that in fashioning a remedy, "an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C. § 206(d)(1) (1970).

IV. The Title VII Claims

The Equal Pay Act's ban on sex-based discrimination in pay is largely paralleled by Title VII's condemnation of "discriminat[ion] against any individual with respect to his compensation . . . because of such individual's . . . sex. . . ." [159] So it is that NWA's policy of rewarding stewardesses unequally for work equal to that of pursers, which we have just confirmed as an Equal Pay Act violation, meets a similar fate under Title VII.[160] The District Court so held,[161] and its judgment directs back pay under Title VII to each shortchanged employee for any period that it is nonrecoverable under the Equal Pay Act.[162] Remedies aside,[163] we face no further Equal Pay Act problem as to stewardesses' salaries.

NWA does, however, protest rulings by the District Court that other company policies tread on stewardesses' statutory rights.[164] The areas of controversy are marked by the stewardesses' complaints of discrimination in the provision of layover accomodations for cabin attendants, in company allowances for maintenance of their uniforms, and in weight restrictions formally imposed only on women. While the first two complaints might be addressed independently under the Equal Pay Act on a theory of wage discrimination,[165] or perhaps even under

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[159] See text *supra* at note 91.

[160] See text *supra* at note 91.

[161] *Laffey* v. *Northwest Airlines*, *supra* note 1, 366 F.Supp. at 789 (Concl. 4).

[162] *Laffey* v. *Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1386-1387.

[163] See Part V *infra*.

[164] Many of these policies have been changed since this litigation was instituted.

[165] See note 175 *infra*.

Title VII as a matter of discrimination in compensation,[166] we may acceptably approach the three primarily on the basis of Title VII's ban on "discriminat[ion] against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual's . . . sex. . . ." [167]

Until recently, only female stewardesses were subject to the company's weight restrictions, which if exceeded resulted in suspension or discharge.[168] Stewardesses in times past at least were also required to share rooms with each other during flight layovers, while male cabin attendants were routinely reimbursed for single rooms.[169] In addition, as the District Court found, the company's allowances for the cleaning and replacement of uniforms differ to the detriment of female cabin attendants.[170] These policies, which have operated disadvantageously upon employees who are women, clearly deprived stewardesses of rights secured by Title VII. NWA does not contend that the practices do not constitute discriminatory conditions of employment, but defends its conduct as inadvertant and unintentional. We find this defense unavailing. The legislative history of Title VII indicates that the Act requires only a general intent to discrimi-

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[166] See text *supra* at note 91 and note 175 *infra*.

[167] See text *supra* at note 91.

[168] *Laffey* v. *Northwest Airlines*, *supra* note 1, 366 F.Supp. at 773-774 (Find. 39).

[169] *Id.*

[170] Other company policies found violative of stewardesses' statutory rights—by rulings not contested on appeal—prohibited them from wearing eyeglasses, required them to purchase prescribed luggage, and imposed on them a shorter height limitation. *Id.* at 790 (Concl. 5(h). See note 24 *supra*.

nate,[171] and prohibits any discriminatory practice which

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[171] In reference to Title VII's enforcement provisions, § 706 (g), 42 U.S.C. § 2000e-5(g) (1970), which authorizes legal and equitable relief against an employer "intentionally" engaging in an unlawful employment practice,

> [I]n determining the meaning of "intentional," resort must be had almost entirely to legislative history. In its original form, 706(g) contained no such requirement; it was amended by Senator Dirksen's proposal, probably in response to opposition pressure. The first draft of the amendment contained the word "willfully" instead of "intentionally"; interpretative material was introduced into the record by Senator Dirksen:
>
> > The words "willful and willfully" as ordinarily employed, mean nothing more than that the person, of whose actions or default the expressions are used, knows what he is doing, intends what he is doing, and is a free agent. . . .
> >
> > The terms are also employed to denote an intentional act . . . as distinguished from an accidental act . . . .
> >
> > This is precisely the situation which might exist if the words are not added. . . . Accidental, inadvertent, heedless, unintended acts could subject an employer to charges under the present language.
>
> For reasons that are not apparent, this version was not enacted, and not until some time later was the amendment with the present language passed. The only significant difference between the two versions is the substitution of "intentionally" for "willfully" and there is no indication that any strengthening of the requirement was meant. It may be concluded that the Dirksen Amendment does not greatly narrow the coverage of section 706(g).

Local 189, United Papermakers & Paperworkers v. *United States*, 416 F.2d 980, 995-996 n.15 (5th Cir. 1969), *cert. denied*, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970), quoting Note, Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 68 Colum. L. Rev. 691, 713 (1968). See also cases cited *infra* note 174.

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was not merely accidental.[172] If an employer intends to promulgate the later found to be improper policy—that is, "the defendant meant to do what he did" [173]—there is no burden to show additional discriminatory motivation in order to recover under Title VII.[174]

The company counters the charge of discrimination in the provision of layover accommodations by insisting that male cabin attendants were instructed to share rooms but that they departed from company policy by booking single rooms.[175] The District Court nonetheless upheld

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[172] *Local 189, United Papermakers & Paperworkers* v. *United States, supra* note 171, 416 F.2d at 995-997.

[173] *Id.* at 996.

[174] "Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent' for 'Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.'" *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 422, 95 S.Ct. 2362, 2374, 45 L.Ed.2d 280, 299 (1975), quoting *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158, 165 (1971) (emphasis in original). See, *e.g.*, *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251, 1259 (5th Cir. 1975); *Frobig* v. *Held Warehouse and Transp. Corp.*, 8 F.E.P. Cas. 926, 929-930 (E.D.N.Y. 1974) ("[t]here is . . . no necessity that [payment of lower wages to female as opposed to male employees] be found to be based on any calculated denigration of women or women's work as distinguished from the simple, conscious paying of a lower rate of pay to women doing equal work than the rate paid to men doing the same work in the same pay periods").

[175] NWA also challenges the District Court's determination that the furnishing on layovers of single rooms to male employees and only double rooms to female employees also violates the Equal Pay Act. *Laffey* v. *Northwest Airlines, supra* note 1, 366 F.Supp. at 789 (Concl. 2). The company contends that lodging does not constitute wages within the meaning of the Act because regulations promulgated thereunder indicate that "payments made by an employer to an em-

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ployee which do not constitute remuneration for employment are not 'wages' to be compared for equal pay purposes under" 29 U.S.C. § 206(d)(1) (1970). 29 C.F.R. § 800.110 (1975). Examples given of payments which are not deemed remuneration are those for maternity and "such reimbursable expenses of traveling on the employer's business as are discussed in [29 C.F.R.] § 778.217." The regulation cited provides in part that "[w]here an employee incurs expenses on his employer's behalf or where he is required to expend sums solely by reason of action taken for the convenience of his employer, . . . [p]ayments made by the employer to cover such expenses are not included in the employee's regular rate. . . . Such payment is not compensation for services rendered by the employee during any hours worked in the workweek."

However, NWA ignores other provisions of the Fair Labor Standards Act and of other regulations formulated under the Equal Pay Act. Specifically, 29 U.S.C. § 203(m) provides in part that " '[w]age' paid to any employee includes the reasonable cost . . . to the employer of furnishing such employee with board, lodging or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees." And a regulation implementing the Equal Pay Act specifies that "[t]he reasonable cost or fair value of certain prerequisites, as provided in [29 U.S.C. § 203(m)] . . . is, by definition, a part of the wage paid to an employee for purposes of the Act." 29 C.F.R. § 800.112 (1975).

It is thus clear that where, as here, the employer customarily furnishes lodging for the employees, as opposed to merely reimbursing them for expenditures made for lodging not regularly supplied, the cost thereof constitutes wages under the Equal Pay Act. Though not entirely manifest from the District Court's finding, *Laffey* v. *Northwest Airlines*, *supra* note 1, 366 F.Supp. at 774 (Find. 39), both sides make it clear that the company's payments were made directly to the hotels and not to the employees as reimbursement. Accordingly, the District Court was correct in holding that the provision of less expensive and less desirable layover accommodations to female employees than were provided to male employees is in derogation of the Equal Pay Act.

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the charge [176] and its ruling is amply sustained. NWA has consistently paid for single accommodations for male employees.[177] That more than sufficiently manifests an attitude condoning the alleged breach of company policy.

NWA has also seen fit to differentiate its stipends for maintenance of uniforms. Men were given a cleaning allowance, while women received a replacement allowance. On evidence comparing the frequency of uniform replacement with the cost of keeping a supply of clean uniforms, the District Court found the policy discriminatory. We discern nothing in the record to disturb this finding.

Prior to suit, the company applied a different maximum height restriction to male and female employees. That differential was likewise held to be discriminatory.[178] Additionally to reinstatement and backpay for stewardesses suspended or terminated for failure to satisfy the weight restrictions,[179] the District Court enjoined NWA from weighing stewardesses, maintaining weight scales, conditioning employment upon an agreement to meet these standards, and punishing any female employee because of weight "unless [it] is such as to render her physically incapable of performing the duties of the job." [180] We

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[176] *Laffey* v. *Northwest Airlines*, *supra* note 1, 366 F.Supp. at 790 (Concl. 5(h)).

[177] *Id.* at 773-774 (Find. 30).

[178] *Laffey* v. *Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1387-1388.

[179] *Id.*

[180] *Id.* at 1387. The company was also ordered to notify all female cabin attendants that the weight requirements and their agreements to adhere thereto would no longer be enforced, and to remove from the cabin service manual any mention of weight requirements beyond such as would render a person "physically incapable of performing the duties of

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affirm the court's resolve to accord reinstatement and backpay to those who suffered from the application of the weight requirements.[181] NWA, however, appeals that portion of the order enjoining the imposition of any weight standard upon any stewardess unless weight prevents discharge of the responsibilities of the employment. NWA has promulgated new weight restrictions for both male and female employees, to operate in a nondiscriminatory fashion. NWA insists that these standards, to affect everyone equally, bring it into compliance with Title VII, and that may well be so. If the present regulations, applied objectively and in good faith, pass muster under Title VII, the company will become entitled to modification of this aspect of the injunction by the District Court. The Company must, however, be prepared to demonstrate that the current restrictions are not a veiled means of retaliation for the institution of this action.[182]

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the job." *Id.* In addition, reinstatement and back pay were ordered for those who had been terminated or grounded on account of weight, and the company was directed to excise from personnel records indication of reprimands arising from noncompliance with those restrictions. *Id.* at 1387-1388.

[181] NWA does not challenge the District Court's conclusion that it discriminated against stewardesses through the use of the weight restrictions. Nor does NWA contest the District Court's order that NWA offer immediate reinstatement to each stewardess suspended or terminated as a result of being overweight. However, the company does attack that part of the court's order which requires it to grant backpay to stewardesses who could not have filed timely charges with the Equal Employment Opportunity Commission on the date that the first filing with the Commission was made by a class member. We consider that issue in Part V(D) *infra*.

[182] Retaliation, it is said, takes the form of pitting male employees against female employees in anger over the latter's having precipitated an unwanted condition covering men.

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We recognize that Title VII discourages the use of even nondiscriminatory but newly-promulgated employee-selection criteria where there is a history of discriminatory treatment of some employees who would continue to be hurt by the new criteria. In *Griggs* v. *Duke Power Company*,[183] the Supreme Court forbade the application of a fair and even-handed standard to black employees who had been barred from formerly "white" jobs when the selection criteria had applied only to blacks:

> Under the Act, practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.[184]

Similarly, the Second Circuit has affirmed an order requiring admission of incumbent black employees to apprenticeship programs if they were "at least as qualified as the least qualified white" previously accepted, despite the subsequent adoption of a more stringent, nondiscriminatory admission standard.[185] And the Equal Employment Opportunity Commission provides by regulation that

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It is claimed that if new restrictions are permitted against all employees, the stewardesses' victory is hollow since they would have won only an expansion of the scope of the old restrictions rather than any alleviation thereof for themselves. Because this claim has not been fully litigated as a factual matter in the District Court, we intimate no view on it.

[183] *Supra* note 174.

[184] *Griggs* v. *Duke Power Co.*, *supra* note 174, 401 U.S. at 430, 91 S.Ct. at 853, 28 L.Ed.2d at 163-164. See also *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1370 & n.7 (5th Cir. 1974).

[185] *United States* v. *Bethlehem Steel Corp.*, *supra* note 109, 446 F.2d at 665.

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> no new test or other employee selection standard can be imposed upon a class of individuals protected by title VII who, but for prior discrimination, would have been granted the opportunity to qualify under less stringent selection standards previously in force.[186]

Applied to the instant case, this principle protects the right of suspended or discharged stewardesses to be reinstated, to be awarded backpay and to have their personnel files rectified for the period of discipline for failure to comply with a restriction which was not imposed on pursers.[187] At that juncture, the position of these stewardesses will be equalized with that of all pursers who were employed during the same period regardless of weight. The stewardesses discriminated against in the past are thus afforded an opportunity to regain their jobs and, on a parity with the most overweight purser employed by NWA, meet the requirements in the future. As long as the company henceforth extends equal treatment in this regard to all pursers and stewardesses in its employ—including all pursers hired in the past, who now must measure up to the new restrictions or be discharged—we cannot say that its desire for trimness in those rep-

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[186] "A test or other employee selection standard . . . cannot be imposed upon any individual or class protected by title VII where other employees, applicants or members, have not been subjected to that standard. Disparate treatment, for example, occurs where members of a minority or sex group have been denied the same employment, promotion, transfer or membership opportunities as have been made available to those other employees or applicants.Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination." 29 C.F.R. § 1607.11 (1975).

[187] See, however, Parts V(C), (D) *infra*.

resenting it in public is discriminatory or unreasonable. We affirm, then, the District Court's conclusion that the inferior pay scales and working conditions to which stewardesses have been subjected entitles them to relief under Title VII and the Equal Pay Act.

V. The Remedial Order

The District Court's judgment is devoted in substantial measure to remediation of violations found, under either the Equal Pay Act or Title VII, with respect to sex-based differentials in salaries, pensions, layover lodgings furnished and uniform-maintenance allowances.[188] In each category, the judgment effects an equalization upward [189] by mandating for female employees the same treatment that NWA had theretofore afforded male employees,[190] and enjoins sex discrimination in any significant aspect of employment of cabin attendants [191] in the future.[192] The judgment also awards backpay [193] under the Equal

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[188] *Laffey* v. *Northwest Airlines, supra* note 1, 374 F.Supp. at 1382-1390.

[189] As we have heretofore observed, see note 158 *supra*, the Equal Pay Act forbids attempted compliance with its provisions by "equalization" through a downward revision of pay. 29 U.S.C. § 206(d)(1) (1970). See *Corning Glass Works* v. *Brennan, supra* note 111, 417 U.S. at 206-207, 94 S.Ct. at 2233-2234, 41 L.Ed.2d at 16-17.

[190] *Laffey* v. *Northwest Airlines, supra* note 1.

[191] The judgment defines "cabin attendants" as "all American-based employees of [NWA] whose principal duties consist of providing in-flight cabin service, whether denominated stewardess, purser, flight service attendant, steward, or otherwise." *Id.* at 1384.

[192] *Id.* at 1385.

[193] Grouped as backpay, though addressed discretely, are cabin attendants' salaries, pensions, the value of lodgings furnished and allowances for uniform-maintenance. *Id.* at 1385-1387.

Pay Act to each "Equal Pay Act plaintiff" [194] for the three-year period preceding the filing of that plaintiff's written consent to joinder in the suit as a claimant therefore; [195] it similarly grants backpay under Title VII to each "Title VII plaintiff" [196] for the period commencing two years prior to the filing of the first charge with the Equal Employment Opportunity Commission,[197] terminating, however, for each employee who is also an Equal Pay Act plaintiff at the beginning of her Equal Pay Act recovery period.[198] NWA complains that some of these provisions go too far, and affected employees insist that the relief granted on these subjects does not extend far enough.

A. *Period of Backpay Recovery Under the Equal Pay Act*

Congress has imposed time limits upon the initiation of employee suits under the Equal Pay Act for either backpay or liquidated damages. The relevant statute specifies that any such action

> may be commenced within two years after the cause of action accrued, and . . . shall be forever barred

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[194] "Equal Pay Act plaintiff(s)" in the judgment are "all female cabin attendants employed by [NWA] who filed timely written consents with this Court, in accordance with 29 U.S.C. § 256 [1970], to become parties plaintiff with respect to the Equal Pay Act aspects of this lawsuit." *Id.* at 1384.

[195] *Id.* at 1385-1386.

[196] "Title VII plaintiff(s)" under the judgment are "all female cabin attendants employed by [NWA] at any time on or after July 2, 1965, excluding only those who filed timely elections with this Court to be excluded from this lawsuit in its entirety." *Id.* at 1384.

[197] See Part V(C) *infra*.

[198] *Laffey* v. *Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1386-1387.

> unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued. . . .[199]

The District Court found NWA's Equal Act violation "willfull" within the meaning of this provision[200] and awarded the Equal Pay Act plaintiffs[201] backpay[202] for three-year periods preceding the filing of timely written consents.[203] NWA contends that retrospection of its backpay liability for periods exceeding two years is an erroneous application of the statute. The core argument, as we understand, is that the statutory word "willfull" connotes an unwholesome state of mind said to be absent in this case, particularly since in an independent ruling the District Court denied liquidated damages upon a finding that NWA's sex-discriminatory policies were pursued in good faith.[204]

—(1) *The Standard For Determining Willfulness*

The suit-limitation provision does not undertake to define "willfull" on its own, nor have we encountered elsewhere in companion legislation any definition seemingly referable to that provision.[205] Courts wrestling with its facial ambiguity have usually subscribed to one or the other of two divergent views. Some, notably in the Fifth Circuit, read "willfull" as requiring nothing more than

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[199] 29 U.S.C. § 255(a) (1970).

[200] *Laffey* v. *Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1390.

[201] See note 194 *supra*.

[202] See note 193 *supra*.

[203] See note 194 *supra* and accompanying text.

[204] We discuss that finding in Part V-B *infra*.

[205] See note 230 *infra*.

knowledge of the possible applicability of the governing statute to the conduct eventually held to be legally wanting.[206] "Stated most simply," says the Court of Appeals for that circuit, "we think the test should be: Did the employer know the [statute] was in the picture." [207] Other courts take a differently worded approach:[208] "[W]illful," declares one, "retains its traditional meaning that violations of the Act must be deliberate, voluntary and intentional." [209] NWA urges upon us still another meaning: that "willfull" requires bad purpose as an element of the violation.

Under some statutes, particularly those directed at conduct involving moral turpitude, an act is "willfull" only if done malevolently, wickedly or criminally.[210] Under

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[206] *Brennan* v. *Heard*, 491 F.2d 1, 3 (5th Cir. 1974); *Brennan* v. *J. M. Fields, Inc.*, 488 F.2d 443, 448 (5th Cir. 1973), *cert. denied*, 419 U.S. 881, 95 S.Ct. 146, 42 L.Ed.2d 121 (1974); *Brennan* v. *General Motors Acceptance Corp.*, 482 F.2d 825, 828-829 (5th Cir. 1973); *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1138, 1142 (5th Cir. 1971), *cert. denied*, 409 U.S. 948, 93 S.Ct. 292, 34 L.Ed.2d 219 (1972).

[207] *Coleman* v. *Jiffy June Farms, Inc.*, *supra* note 206, 458 F.2d at 1142.

[208] *Hodgson* v. *Unified School Dist.*, 21 Wage & Hour Cas. 574, 577 (D. Kan. 1973); *Boll* v. *Federal Reserve Bank*, 365 F.Supp. 637, 648-649 (E.D. Mo. 1973), *aff'd*, 497 F.2d 335 (1974); *Brennan* v. *Westinghouse Credit Corp.*, 21 Wage & Hour Cas. 871, 875-876 (E.D. Tenn. 1973). See also *Dunlop* v. *New Jersey*, 522 F.2d 504, 518 (3d Cir. 1975); *Hodgson* v. *Cactus Craft of Arizona*, 481 F.2d 464, 467 (8th Cir. 1973); *Hodgson* v. *Barge, Waggoner & Sumner, Inc.*, 377 F.Supp. 842, 845 (M.D. Tenn. 1972), *aff'd*, 477 F.2d 598 (6th Cir. 1973).

[209] *Brennan* v. *Westinghouse Credit Corp.*, *supra* note 208, 21 Wage & Hour Cas. at 876.

[210] *E.g.*, *Spurr* v. *United States*, 174 U.S. 728, 734-735, 19 S.Ct. 812, 814-815, 43 L.Ed. 1150, 1152-1153 (1899).

other types of statutes, it suffices that the act was performed consciously and voluntarily, rather than inadvertently or accidentally.[211] Betwixt these two formulations, "willfull" has been given various other meanings,[212] although shades of difference ofttimes diminish when the probe extends beneath the surface.[213] Because of its inherent instability, only the most careful consideration of the term "willfull" in its legislative context can provide satisfactory assurance that eventually it will take on its proper cast.[214] And so it does here.

The suit-limitation provision in its original form was part of the congressional response to an "existing emergency" [215] three decades ago. In 1946, the Supreme Court had held that employees were entitled to portal-to-portal pay under the Fair Labor Standards Act.[216] In 1947, Congress declared that allowance of claims therefor would create "wholly unexpected liabilities, immense in amount

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[211] *E.g., Nabob Oil Co.* v. *United States*, 190 F.2d 478, 480 (10th Cir.), *cert. denied*, 342 U.S. 876, 72 S.Ct. 167, 96 L.Ed. 658 (1951).

[212] See, *e.g., United States* v. *Murdock*, 290 U.S. 389, 394-395, 54 S.Ct. 223, 225, 78 L.Ed. 381, 384-385 (1933).

[213] "It is only in very few criminal cases that 'willfull' means 'done with a bad purpose.' Generally, it means 'no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.'" *Townsend* v. *United States*, 68 App.D.C. 223, 229, 95 F.2d 352, 358, *cert. denied*, 303 U.S. 664, 58 S.Ct. 830, 82 L.Ed. 1121 (1938).

[214] See *Spies* v. *United States*, 317 U.S. 492, 497, 63 S.Ct. 364, 367, 87 L.Ed. 418, 422 (1943).

[215] 29 U.S.C. § 251 (1970).

[216] *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946).

and retroactive in operation," [217] and enacted legislation to deal with the situation.[218] A limitation period of two years for all claims [219] was designed specifically to eliminate differences arising from "the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers . . . ."[220] Its aim thus was to establish for employee recoveries a nationally uniform cutoff point, whether for purposeful or innocent transgressions of the Act.

The limitation period continued at two years until enactment of the Fair Labor Standards Amendments of 1966.[221] During the process leading to that legislation, an effort was made to enlarge the limitation period to three years for any type of violation, for reasons expressed by the then Secretary of Labor:

> The lengthening of the statute of limitations to three years will allow workers more time to familiarize themselves with their legal right to back wages and thus improve enforcement of the Act. The short statute of limitations gives competitive advantage to violators and penalizes many workers in the collection of wages legally due. The Federal Criminal Statute runs for three years or more. The existing two-year period under [the Fair Labor Standards Act] is also shorter than that allowed creditors of

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[217] 29 U.S.C. § 251 (1970).

[218] The legislation was the Portal-to-Portal Act of 1947, Act of May 14, 1947, ch. 52, 61 Stat. 84, as amended, 29 U.S.C. §§ 251 *et seq.* (1970). See also *Steiner* v. *Mitchell*, 350 U.S. 247, 253, 76 S.Ct. 330, 334, 100 L.Ed. 267, 272 (1956).

[219] Act of May 14, 1947, ch. 52, § 6, 61 Stat. 87.

[220] Act of May 14, 1947, ch. 52, § 1, 61 Stat. 84, 29 U.S.C. § 251.

[221] Pub.L. No. 89-901, 80 Stat. 830 (1966).

employees to collect money owed for food and rent bills.[222]

As the bill emerged from committee, however, the limitation provision appeared in its current form.[223] The period had been lengthened to three years for a "willfull violation," but for others it remained at two.[224] We have not uncovered any clear-cut statement in the legislative history as to why the extension to three years was thus encumbered. There is ample room, however, for an informed belief that, with the amendments' broad expansion of the Act's coverage [225] and resultant concern over the effect on the small businessman,[226] an unqualified increase of the limitation period would bear too heavily upon an inevitably larger group of excusably inadvertent violators.[227]

Be that as it may, the important consideration is the absence from the legislative history of any visible move-

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[222] Hearings on H.R. 8259 Before the General Subcommittee on Labor of the Committee on Education and Labor 7 (1965) (statement of Secretary Wirtz).

[223] S. Rep. No. 1487, 89th Cong., 2d Sess. 36, 69 (1966); H.R. Rep. No. 1366, 89th Cong., 2d Sess. 46, 77 (1966).

[224] See text *supra* at note 199.

[225] See S. Rep. No. 1487, 89th Cong., 2d Sess. 1-4 (1966); H.R. Rep. No. 1366, 89th Cong., 2d Sess. 4-10 (1966).

[226] "The proposed coverage brings small local business immediately into coverage. There are no exact figures on how many retail establishments would be affected by the bill, but there are definite indications that the number is substantial. . . . Businessmen state that they will have to reduce their work forces substantially and even then will be faced with the grave problem of whether or not they can remain in business." S. Rep. No. 1487, 89th Cong., 2d Sess. 76-77 (statement of Senator Fannin).

[227] See note 226 *supra*.

ment to impart criminal-law precepts of moral culpability into the statutory scheme as a condition to accountability for a civil wrong. There is nothing to suggest that the congressional effort either in 1947 or 1966 was the exaction of a penalty, to which moral culpability would be highly relevant. On the contrary, the implication is almost irresistible that the objective consistently was the erection of a bulwark to extensive liability, and to economic hardships that would follow. Because in 1947 Congress feared a crisis from enforcement of an unexpected multitude of newly-arising claims, and because in 1966 the coverage of the Act was being greatly widened to encompass a host of enterprises never before subjected, it seems evident that on each occasion Congress wished to insure that those who were unwittingly intercepted by the Act were not impacted with a three-year statute of limitations. These circumstances undergird the unlikelihood that "willfull," in this role, was intended to exact bad purpose on the employer's part—rather than simply a lesser factor reducing the employer's predicament to something less than a wholly unanticipated prospect of late-found liability—as a precondition to an extra year's recovery.

It seems also significant that the requirement of willfullness is not one which must be met in order that there be liability, but rather is one to be satisfied before there can be expanded liability. The nonwillfull character of a violation of the Act does not defeat recovery, although it does confine the period therefor to two years, and a willfull violation lengthens the period merely by another year. An employer out of compliance, but not willfully so, is spared the burden of recompense beyond a period of two years; an employer willfully out of compliance, despite his willfullness is spared beyond a period of three years. The relatively small difference between the two- and three-year periods tends to question any notion that

the distinguishing criterion was to be moral rather than intellectual culpability. Since a morally innocent employer is nonetheless liable for two years, one may ask why a "willfull" violator's accountability is for only one year more if the term is to imply wicked purpose.

We realize, of course, that a lighter burden would subject a good many employers to the extra year of liability notwithstanding that their violations may represent little or no more than an erroneous interpretation of the statutory requirements. On the other hand, employers as a class occupy a much superior position vis-a-vis their employees to ascertain the effect of the law upon their business policies and practices. Even where the closeness of the question of the statute's applicability hampers or forestalls absolute decisional accuracy, there is no good reason for translating the employer's error into a loss of pay for the employee.

Atop all else, the Equal Pay Act, and the Fair Labor Standards Act of which the former is a part, undoubtedly are remedial statutes, as such to be liberally construed in favor of their intended beneficiaries.[118] In light of this, as well as the historical backdrop against which we must view this legislation, we could not readily attribute to Congress a purpose to impose upon employee-claimants the much heavier burden—sometimes, perhaps, a well-nigh impossible burden—of proving an iniquitous employer state-of-mind as a prerequisite to a backpay recovery for the third year. We reject, then, a definition of "willfull" in the suit-limitation provision which would demand proof that the employer entertained a bad purpose or an evil intent. At the same time, we need not

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[118] *E.g., Corning Glass Works* v. *Brennan, supra* note 111, 417 U.S. at 208, 94 S.Ct. at 2234-2235, 41 L.Ed.2d at 17; *Coles* v. *Penny*, —— U.S.App.D.C. ——, ——, 531 F.2d 609, 615 (1976).

go so far as to hold that a violation is willfull merely because from the employer's viewpoint the statute was in the picture.[229] Nor need we undertake to precisely define "willfull" for cases closer than the one at bar.[230] We think that at the very least the employer's noncompliance is "willfull" when he is cognizant of an appreciable possibility that he may be subject to the statutory requirements and fails to take steps reasonably calculated to resolve the doubt.[231] We think, too, that the same conclusion

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[229] As one commentator has observed, "[s]ince virtually every employer knows of the possible applicability of [the Fair Labor Standards Act] to his business, the practical effect of this interpretation is to eliminate the two year statute of limitations from the act. If this were the result Congress intended, it would not have drafted the statute so that the two year period is the rule and the three year period is the exception." Richards, *Monetary Awards in Equal Pay Act Litigation*, 29 Ark. L. Rev. 328, 338 (1975).

[230] NWA contends that "willful," in the suit-limitation provision takes on the interpretation given the same work in the criminal provision of the Fair Labor Standards Act, 29 U.S.C. § 216(a) (1970). We do not agree that the criminal construction is to be imparted into the civil provision simply because both provisions are part of the same statute. The purposes of the two sections are entirely different; one punishes as criminal certain specified conduct while the other subserves a policy to which punishment is entirely foreign. Compare *Corning Glass Works* v. *Brennan*, *supra* note 111, 417 U.S. at 207, 94 S.Ct. at 2234, 41 L.Ed.2d at 17. In any event, under § 216's definition of "willful," "[i]t is sufficient if the act was deliberate, voluntary and intentional as distinguished from one committed through inadvertence, accidentally or by ordinary negligence." *Nabob Oil Co.* v. *United States*, *supra* note 211, 190 F.2d at 480. We reach no different conclusion in this case by that definition. See note 232 *infra* and accompanying text. Compare *Coleman* v. *Jiffy June Farms, Inc.*, *supra* note 206, 458 F.2d at 1142.

[231] Compare *Brennan* v. *Heard*, *supra* note 206, 491 F.2d at 3.

follows when an equally aware employer consciously and voluntarily charts a course which turns out to be wrong.[222] Beyond these holdings, we need not venture now.

—(2) *The Decision On NWA*

The District Court expressly found NWA's multifold violations of the Equal Pay Act to be "willfull".[223] The court explained:

> The Equal Pay Act violation was willful in that [NWA] was fully aware of the Equal Pay Act and adopted a deliberate and knowing course of conduct despite its awareness. The Court does not find an intentional, bad faith, attempt to evade the law. The judgment of [NWA] that its conduct would not be found to be in violation of the Equal Pay Act has been found to be in error. The conduct of [NWA] in the exercise of that judgment was willfull.[224]

This finding is fully binding upon us unless "clearly erroneous." [225] NWA does not say that the finding lacks evidentiary support in the record, nor could it. An official of NWA testified by deposition that since 1963 the company was aware of the Equal Pay Act, was generally familiar with its provisions, and had internally reviewed it for its possible application to the company.[226] NWA understood the Act's central provision that male and female employees cannot be paid differently for perform-

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[222] In situations of that sort, "the act [is] deliberate, voluntary and intentional as distinguished from one committed through inadvertence, accidentally or by ordinary negligence." See note 230 *supra*.

[223] *Laffey* v. *Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1390.

[224] *Id.*

[225] Fed.R.Civ. P. 52(a).

[226] J.App. 1477-1478.

ing substantially the same work, and considered its own policies respecting cabin attendants in that light.[237] The company concluded that the Act was inapplicable because it felt that the purser and stewardess jobs were substantially different.[238] Even after the filing of charges with the Equal Employment Opportunity Commission and the subsequent filing of this lawsuit, NWA continued to adhere to that position.[239] No written memorandum on the subject was prepared or received by the company, although it may have been provided oral advisories by a trade association.[240] The witness had no recollection that NWA ever conferred with outside counsel on the subject, and he did not specifically mention any sort of legal advice at all.[241] We have not been referred to, nor have we discovered, any other evidence bearing on the subject. We think the witness' testimony amply sustains the District Court's finding that NWA "was fully aware of the Equal Pay Act and adopted a deliberate and knowing course of conduct despite its awareness." [242]

NWA asserts, however, that the facts found are legally insufficient to enable the conclusion that the violation was "willfull." It argues for an interpretation of the term which would require bad purpose or evil intent,[243] which the District Court's findings disclaimed.[244] We have de-

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[237] J.App. 1478.

[238] J.App. 1478-1479.

[239] J.App. 1479.

[240] J.App. 1477-1478.

[241] J.App. 1477-1478.

[242] See text *supra* at note 234.

[243] See text *supra* at note 210.

[244] See text *supra* at note 234.

clined acceptance of that definition of willfullness,[245] and in our view of the most that willfullness involves [246] we are satisfied that the necessary elements are present here. NWA not only knew of the Equal Pay Act and its content but also correctly understood its prohibition on different salary levels for men and women performing substantially similar work. With little or nothing beyond internal consideration by laymen—even after the present legal challenge got under way—the company consciously though erroneously concluded that its treatment of pursers and stewardesses was unaffected by the Act. We deem that sufficient to comprise willfullness; in the District Court's words, "[t]he conduct of the Company in the exercise of that judgment was willfull." [247] For reasons already extensively articulated,[248] we agree.

It is also contended by NWA that the District Court was logically inconsistent in finding that the Equal Pay Act violation occurred in good faith [249] and in also finding that the violation was willfull. This claim is of a piece with NWA's insistence that willfullness is inextricably tied to bad purpose.[250] We have said that it is not; [251] we have equated willfullness, rather, with conduct which is consicous and voluntary in character.[252] It follows that a practice may be deliberate, and thus willfull, notwithstanding motivation that is honest. Even if NWA pur-

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[245] See text *supra* at notes 229-232.

[246] See note 230 *supra*.

[247] See text *supra* at note 234.

[248] See text *supra* at notes 214-232.

[249] See Part V(B) *infra*.

[250] See text *supra* at note 243.

[251] See text *supra* at notes 214-232.

[252] See text *supra* at notes 229-232.

sued in good faith the policies which the District Court held to be unlawful, its conduct was willfull within the meaning of the limitation provision.

B. *Good Faith*

To each affected employee, an employer infringing the Equal Pay Act is statutorily liable, in consequence of its interrelationship with the Fair Labor Standards Act,[253] not only for unpaid compensation but also for "an additional equal amount as liquidated damages." [254] The predicate for the latter imposition is the reality that "[t]he retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages." [255] Originally mandatory in its provision,[256] the statutory provision on liquidated damages was amended in 1947 to confer discretion on the courts to deny otherwise awardable liquidated damages in whole or part when satisfied that the employer acted or omitted action "in good faith and that he had reasonable grounds for believing that his act or omission was not a violation. . . ." [257] In the instant case, the District Court so found:

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[253] See note 88 *supra* and accompanying text.

[254] "Any employer who violates the provisions of [the Fair Labor Standards Act] shall be liable to the employee or employees affected in the amount of the unpaid minimum wages, or unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b) (1970).

[255] *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572, 583-584, 62 S.Ct. 1216, 1222-1223, 86 L.Ed. 1682, 1690-1691 (1942).

[256] See text *infra* at notes 264-270.

[257] "[I]f the employer shows to the satisfaction of the court that the act or omission giving rise [to the violation] was in good faith and that he had reasonable grounds for believ-

> [NWA] did have reasonable grounds for belief that it was not violating the Equal Pay Act. While this court has found as fact that the jobs of purser and stewardess are in fact equal, it was not unreasonable for the Company to have believed otherwise. Five factors support this conclusion: The traditional practice of the Company in treating the positions as unequal, the general industry practice to the same effect, the acquiescence of the stewardess' bargaining representative in this arrangement, the absence of any grievances or even suggestions from stewardesses to the contrary prior to the present controversy, and the absence of any clear legal precedent or guideline precisely in point.[258]

The good faith of which the Act speaks is "an honest intention to ascertain what the . . . Act requires and to act in accordance with it." [259] That necessitates a subjective inquiry.[260] The statutory call for reasonable grounds for a belief in compliance with the Act imposes a requirement additional to good faith,[261] and one that involves an objective standard.[262] Any assessment of an

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ing that his act or omission was not a violation of [the Act] as amended, the court may, in its sound discretion, award no liquidated damages or award any amounts thereof not to exceed the amount specified in" § 216(b), *supra* note 254. 29 U.S.C. § 260 (1970).

[258] *Laffey* v. *Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1390.

[259] *Addison* v. *Huron Stevedoring Corp.*, 204 F.2d 88, 93 (2d Cir.), *cert. denied*, 346 U.S. 877, 74 S.Ct. 120, 98 L.Ed. 384 (1953).

[260] *Id.* at 93.

[261] *Id.* See also note 268 *infra*.

[262] *Addison* v. *Huron Stevedoring Corp.*, *supra* note 259, 204 F.2d at 93.

employer's good faith or grounds for his belief in the legal propriety of his conduct is necessarily a finding of fact, to be disturbed on appeal only if clearly erroneous.[263] In the case at bar, however, it is clear enough that the District Court relied on factors not supportive of its conclusion. Accordingly, we must remand for redetermination of the issue.

The current version of the liquidated damages provision was enacted in response to the Supreme Court's lament in *Overnight Motor Transportation* v. *Missel*[264] of the then mandatory nature of the judicial duty respecting liquidated damages.[265] In that case, the fact that an employer was not exempt from the Fair Labor Standards Act's coverage did not plainly emerge until after the employment in question had ended. The Court expressed sympathy for the employer but concluded nevertheless:

> Perplexing as [the employer's] problem may have been, the difficulty does not warrant shifting the burden to the employee. The wages were specified for him by the statute, and he was no more at fault than the employer. The liquidated damages for failure to pay the minimum wages . . . are compensation, not a penalty or punishment by the Government. . . . The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages.[266]

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[263] Fed.R.Civ.P. 52(a); *Addison* v. *Huron Stevedoring Corp.*, *supra* note 259; *Hodgson* v. *Miller Brewing Co.*, *supra* note 135, 457 F.2d at 228; *Day & Zimmerman* v. *Reed*, 168 F.2d 356, 360 (8th Cir. 1948); *Lassiter* v. *Guy F. Atkinson Co.*, 176 F.2d 984, 993, 21 A.L.R.2d 1313 (9th Cir. 1949).

[264] *Supra* note 255.

[265] Portal-to-Portal Act, H.R. Rep. No. 71, at 7-8 (1947).

[266] 316 U.S. at 583-584, 63 S.Ct. at 1222-1223, 86 L.Ed. at 1690-1691.

Congress reacted by an amendment conferring the present discretion on the courts to limit or deny liquidated damages if the employer could meet the "substantial burden" [267] of proving that his failure to comply was in good faith and also was predicated on reasonable grounds for a belief that he was in compliance.[268] If the employer cannot convince the court in these respects, an award of liquidated damages remains mandatory;[269] and even if

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[267] *Rothman* v. *Publicker Indus., Inc.*, 201 F.2d 618, 620 (3d Cir. 1953).

[268] 29 C.F.R. § 790.22(b) (1975), provides:

> The conditions prescribed as prerequisites to [the court's denial of liquidated damages] are two: (1) The employer must show to the satisfaction of the court that the act or omission giving rise to such action was in good faith; and (2) he must show also, to the satisfaction of the court, that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act. . . . If, . . . the employer does not show to the satisfaction of the court that he has met the two conditions mentioned above, the court is given no discretion by the statute, and it continues to be the duty of the court to award liquidated damages (footnote omitted).

Rothman v. *Publicker Indus., Inc., supra* note 267, 201 F.2d at 620 (under the Portal-to-Portal Act, a delinquent employer seeking to escape payment of liquidated damages has "a plain and substantial burden of persuading the court that his failure to obey the [Fair Labor Standards Act] was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict."). See also *Wright* v. *Carrig*, 275 F.2d 448 (4th Cir. 1960); *McClanahan* v. *Matthews*, 440 F.2d 320, 322-323, 26 A.L.R. Fed. 598 (6th Cir. 1971). *Cf. National Automatic Laundry & Cleaning Council* v. *Shultz, supra* note 127, 143 U.S.App.D.C. at 282 & n.6, 443 F.2d at 697 & n.6, and see generally Richards, *Monetary Awards in Equal Pay Act Litigation*, 29 Ark. L. Rev. 328, 347-354 (1975).

[269] *McClanahan* v. *Matthews, supra* note 268, 440 F.2d at 323; *Thomas* v. *Louisiana*, 348 F.Supp. 792 (W.D. La. 1972);

the employer's presentation is persuasive the court may still exercise its discretion to grant liquidated damages totally or partially.[270]

Examined against this background, the reasons given by the District Court for disallowing liquidated damages betray their legal inadequacy.[271] That an employer and others in the industry have broken the law for a long time without complaints from employees is plainly not the reasonable ground to which the statute speaks.[272] Nor is it enough that it appear that the employer probably did not act in bad faith; he must affirmatively establish that he acted both in good faith and on reasonable grounds.[273] That duty is accentuated here, where the prevalence of sex-discrimination litigation against the airline industry [274] naturally prompts the question whether

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29 C.F.R. § 790.22(b) (1974); *contra*, *Baird* v. *Wagoner Transp. Co.*, 18 Wage & Hour Cas. 597 (W.D.Mich. 1968), *aff'd*, 425 F.2d 407 (6th Cir.), *cert. denied*, 400 U.S. 829, 91 S.Ct. 58, 27 L.Ed.2d 59 (1970).

[270] *McClanahan* v. *Matthews*, *supra* note 268, 440 F.2d at 322-324.

[271] The court's ruling on liquidated damages has been characterized as one "of particular interest and very doubtful correctness." Richards, *Monetary Awards in Equal Pay Act Litigation*, 29 Ark. L. Rev. 328, 352 (1975). The degree to which Congress' 1947 modification may have changed the character of liquidated damages from compensatory to punitive allowances is a matter we need not now decide. See generally *id.* at 348-350; *Russell* v. *American Tobacco Co.*, 528 F.2d 357, 366 (4th Cir. 1975), *cert. denied*, —— U.S. ——, 96 S.Ct. 1667, 48 L.Ed.2d 176 (1976).

[272] See note 268 *supra*.

[273] See note 268 *supra*.

[274] *E.g.*, *Ponds* v. *Braniff Airways*, 500 F.2d 161 (5th Cir. 1974); *Airline Stewards & Stewardess' Ass'n, Local 550*, v. *American Airlines*, 490 F.2d 636 (7th Cir. 1973), *cert. de-*

NWA should reasonably have known that neither its own tradition, the industry custom nor the employees' silence was a reliable indicium of the demands of the law.[275] We need not inquire whether business custom or employee acquiescence might in particular circumstances explain why an otherwise punctilious employer did not investigate his situation more thoroughly, for in any event they do not provide a reasonable foundation for a positive belief that in fact there is compliance.

We share with the District Court the view that ambiguous or complex legal requirements may provide reasonable grounds for an employer's good faith but erroneous belief that he is in conformity with the Act.[276]

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nied, 416 U.S. 993, 94 S.Ct. 2406, 40 L.Ed.2d 773 (1974); *Sprogis* v. *United Air Lines*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 (1971); *Gerstle* v. *Continental Airlines*, 358 F.Supp. 545 (D. Colo. 1973); *Cooper* v. *Delta Airlines*, 274 F.Supp. 781 (E.D. La. 1967); *Defiguiernedo* v. *Trans World Airlines*, 322 F.Supp. 1384 (S.D.N.Y. 1976); *Maguire* v. *Trans World Airlines*, 55 F.R.D. 48 (S.D.N.Y. 1972).

[275] Employee silence is very different from an absence of complaint by Department of Labor officials following examination of the employer's system. See *Retail Store Employees Union, Local 400* v. *Drug Fair Community Drug Co.*, 307 F.Supp. 473, 479-480 (D.D.C. 1969); *Hodgson* v. *Barge, Wagoner & Sumner, Inc.*, *supra* note 208, 377 F.Supp. at 1845.

[276] *Van Dyke* v. *Bluefield Gas Co.*, 210 F.2d 620 (4th Cir.), *cert. denied*, 347 U.S. 1014, 74 S.Ct. 870, 98 L.Ed. 1137 (1954); *General Elec. Co.* v. *Porter*, 208 F.2d 805 (9th Cir. 1953); *Harp* v. *Continental/Moss-Gordin Gin Co.*, 259 F. Supp. 198 (M.D. Ala. 1966), *aff'd*, 386 F.2d 995 (5th Cir. 1967); *Kelly* v. *Ballard*, 298 F.Supp. 1301 (S.D. Cal. 1969); *Bauler* v. *Pressed Steel Car Co.*, 81 F.Supp. 172 (N.D. Ill. 1948), *aff'd*, 182 F.2d 357 (2d Cir. 1950); *Peperissa* v. *Coren-Indik, Inc.*, 298 F.Supp. 34 (E.D. Pa. 1969).

[Continued]

Indeed, just that sort of employer-predicament was the concern of Congress when it enacted the 1947 amendments.[277] But legal uncertainty, to assist the employer's defense, must pervade and markedly influence the employer's belief; merely that the law is uncertain does not suffice. While the District Court cited the absence of precise legal guidelines as a factor indicating reasonableness on NWA's part, it made no finding that that condition actually led NWA to believe that it was in compliance with the Equal Pay Act. Furthermore, even when the court finds good faith and a reasonable basis, it retains discretion to award liquidated damages.[278] We cannot say that the District Court's decision to deny such damages would have been reached had it known that any of the five factors upon which it relied would not survive scrutiny.[279]

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[278] [Continued]

On the other hand, maintenance of a practice of "highly questionable legality" constitutes bad faith. *Albemarle Paper Co.* v. *Moody*, *supra* note 174, 422 U.S. at 422, 95 S.Ct. at 2374, 45 L.Ed.2d at 299. Lack of reasonable grounds has also been found where an employer waited for an impending Supreme Court decision on the validity of amending legislation, *Thomas* v. *Louisiana*, *supra* note 269, 348 F.Supp. at 796; where a Supreme Court decision in another case had made it clear that the employer's defense was not valid, *King* v. *Board of Educ.*, 435 F.2d 295, 298 (7th Cir. 1970), *cert. denied*, 402 U.S. 908, 91 S.Ct. 1380, 28 L.Ed.2d 649 (1971); where the employer continued a course of conduct after inspectors indicated that it violated the Act, *American Newspaper Guild* v. *Republican Publishing Co.*, 8 Wage & Hour Cas. 140, *aff'd*, 172 F.2d 943 (1st Cir. 1949); where the employer claimed that he did not know the details of the job in issue, *Day & Zimmerman* v. *Reid*, *supra* note 263, 168 F.2d at 359-360.

[277] See text *supra* at notes 264-270.

[278] See note 270 *supra* and accompanying text.

[279] In *Crago* v. *Rockwell Mfg. Co.*, 301 F.Supp. 743 (W.D. Pa. 1969), it was held that "[a]lthough defendant did not

C. *Title VII Recovery Period*

On its finding that in particular respects NWA had violated Title VII, the District Court awarded affected employees backpay [280] to remedy the pay discrimination wrought thereby,[281] but limited the recovery period to two years from the date on which charges were filed with the Equal Employment Opportunity Commission.[282] The court explained:

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do all that might have been done by a reasonable employer in determining whether it was in compliance with the Act, such as securing from its legal department a reliable opinion incident to plaintiff's employment, and again seeking the advice of the Wage and Hour Division, this circumstance does not preclude defendant from protection under [the liquidated damages provision]." *Id.* at 748. The court then found that the defendant had acted in good faith on reasonable grounds to believe it was not violating the Act, but still awarded partial liquidated damages "representing plaintiff's loss of use of the overtime compensation due him. . . ." *Id.*

The employee litigants also complain that the provision of the judgment on liquidated-damages is ambiguous in one respect and deficient in another. Since we are remanding the matter of liquidated damages in toto for reconsideration by the District Court, to which any further grievance by either side may be addressed, we do not pass on these contentions on this appeal.

[280] The elements of backpay are the same as for Equal Pay Act plaintiffs. See note 193 *supra*.

[281] The court's judgment also directed NWA to pay the difference between one-half of the value of double rooms provided employees on layovers and the value of a single room had it been provided. *Laffey* v. *Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1386, 1387. NWA was also ordered to pay to eligible Title VII plaintiffs, see note 196 *supra*, a uniform-cleaning allowance, *id.* at 1387, thus matching a similar provision in favor of Equal Pay Act plaintiffs. See text *supra* at note 78.

[282] As we have heretofore observed, there will be no overlapping recovery by anyone entitled to benefit from both

The Court has discretion to award backpay to July 2, 1965,[283] but has chosen to limit that award herein. The 1972 amendment to Title VII [284] . . . limiting backpay liability to not more than two years prior to filing of charges with the [Commission] [285] is not applicable to this case. Nevertheless, it does indicate that Congress felt some limitation is appropriate to avoid "windfall" damage awards and to avoid harsh, and sometimes unbearable, economic burdens upon

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Title VII and the Equal Pay Act since in all instances the Title VII backpay recovery is cut off on "the day preceding the commencement of her Equal Pay Act recovery period . . . ." *Id.* at 1386.

[283] This was the effective date of the enforcement provision of Title VII upon which the District Court predicated this aspect of its judgment. See Pub.L. No. 88-352, tit. VII, § 716(a), (b), 78 Stat. 266 (1964).

[284] Prior to the 1972 amendments, there was no statutory limitation upon the period for which Title VII backpay might be awarded. Pub.L. No. 88-352, tit. VII, § 706(g), 78 Stat. 261, 42 U.S.C. § 2000e-5(g) (1970).

[285] 42 U.S.C. § 2000e-5(g) (Supp. II 1972) in relevant part provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful practice), or any other equitable relief as the court deems appropriate. Backpay liability shall not accrue from a date more than two years prior to the filing of a charge with the [Equal Employment Opportunity] Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

> the employers. The amendment also indicates that two years is an appropriate and reasonable period for measuring the adequacy of the remedy for the plaintiff. In light of these considerations, the court has, in the exercise of its discretion, limited the recovery period."[226]

Both sides claim error. Two issues must therefore be joined: what statute of limitations applies to pre-1972 Title VII cases, and whether within that limitation the trial judge had discretion further to restrict an award of backpay.

Preliminarily, we note that the District Court was correct in holding that the 1972 amendment inaugurating the two-year limitation on backpay liability does not apply to this case. In the amending legislation, Congress made significant changes in the Equal Employment Opportunity Commission's procedures and expressly provided that "the amendments made by this Act" to the enforcement provision of Title VII upon which the District Court's judgment rested "shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter." [227] The irresistible inference from this language is that the amendments were not to extend to litigation which on their effective date had proceeded beyond the Commission stage. Here, on that date, the charges by Title VII claimants were no longer before the Commission, and the case was well underway in the courts,[228] and thus was not affected

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[226] *Laffey* v. *Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1390.

[227] Equal Employment Opportunity Act of 1972, Pub.L. No. 92-261, § 14, 86 Stat. 113.

[228] On July 14, 1970, the Commission notified the employees that they were entitled to initiate a civil action, and on July 15, 1970, the complaint was filed in the District Court.

by the new two-year provision.[289]

Even so, both sides have argued from the 1972 amendments in favor of their respective positions on the proper limitation period for pre-1972 cases.[290] Quite apart from the canon that the meaning of legislation cannot be altered by remarks subsequent to its passage,[291] we must construe Title VII on the assumption that Congress did not intend in 1964 to limit liability by later amendment. Thus the employee-parties' contention that backpay may be awarded back to the effective date of the Act[292] seems

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[289] See *Bing* v. *Roadway Express*, 485 F.2d 441, 453 n.14 (5th Cir. 1973); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301, 315 (6th Cir. 1975).

[290] The employees rely on assertions during legislative consideration of the amendments that the 1964 version permitted backpay retroactively to the effective date of the Act, *i.e.*, that there was no statutory limitation. Their argument based on this congressional spectre-raising is addressed *infra*, text and notes at notes 292, 294.

NWA attempts to persuade us that the absence of a backpay limit in the 1964 Act restricts the District Court's discretion to "the beginning of the period in which Congress stated it was reasonable to expect someone to complain, viz., 90 days before the filing" of the charge with the Commission. Reply Brief of Appellant NWA at 32. Since such a contention would cut the heart out of the well-accepted "continuing violation" theory, see, *e.g.*, *Macklin* v. *Spector Freight Sys., Inc.*, *supra* note 112, 156 U.S.App.D.C. at 77-78, 478 F.2d at 987-988, we concur in the Fifth Circuit's analysis in *United States* v. *Georgia Power Co.*, 474 F.2d 906, 922-923 (5th Cir. 1973), in rejecting such a limit. NWA's second contention is directed to support of the District Court's use of the two-year limit specified in the amendments as an index of reasonableness in the exercise of its discretion. That argument too is addressed *infra* at notes 320-321.

[291] *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132, 95 S.Ct. 335, 353, 42 L.Ed.2d 320, 346-347 (1974).

[292] July 2, 1965. Pub. L. No. 88-352, tit. VII, § 716(a), 78 Stat. 266 (1964).

superficially plausible now that the amendments have limited liability measured in that manner to seven years.[293] Absent the amendments, however, such a novel interpretation would have subjected NWA to a potentially unlimited backpay liability. This is not to suggest that Congress considered and put aside such a construction; rather, "the fact that such matters would require thought" leads us ultimately to reject it.[294]

Seen in this light, the problem at this point is simply that of fashioning a federal common law period of limitations.[295] Most often this is effected by adopting the period prescribed by the most analogous state statute.[296] Because of its convenience, and of the notice it presumably affords prospective litigants,[297] adoption of the state limitation period is proscribed only when it would create important conflicts with the federal policy underlying the cause of action,[298] or when it would amount to discrimina-

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[293] See 42 U.S.C. § 2000e-5(g) (Supp. II 1972).

[294] *Cf. Manchester Modes, Inc.* v. *Schuman*, 426 F.2d 629, 633 (2d Cir. 1971).

[295] See generally 2 J. Moore, Federal Practice ¶ 3.07[2]-[3] (2d ed. 1948); Note, Federal Statutes Without Limitations Provisions, 53 Colum. L. Rev. 68 (1953).

[296] *E.g., Runyon* v. *McCrary*, —— U.S. ——, ——, 96 S.Ct. 2586, 2599, 49 L.Ed.2d 415, 430-431 (1976); *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 701-704, 86 S.Ct. 1107, 1110-1113, 16 L.Ed.2d 192, 197-199 (1966); *Cope* v. *Anderson*, 331 U.S. 461, 67 S.Ct. 1340, 91 L.Ed. 1602 (1947); *O'Sullivan* v. *Felix*, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980 (1914); *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241 (1906); *Campbell* v. *Haverhill*, 155 U.S. 610, 15 S.Ct. 217, 39 L.Ed. 280 (1895).

[297] See *Johnson* v. *Railway Express Agency*, *supra* note 112, 421 U.S. at 464, 95 S.Ct. at 1722, 44 L.Ed.2d at 303-304.

[298] See, *e.g., Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946); *cf. UAW* v. *Hoosier Cardinal Corp.*, *supra* note 296, 383 U.S. at 701-703, 86 S.Ct. at 1110-1112, 16 L.Ed.2d at 197-198;

tory restriction of a federal right of action.[299] Neither of those conditions exists here. While adoption of relatively short[300] state periods will prevent the fullest possible realization of the compensatory aims of Title VII, such is the inevitable result of any time bar to recovery. Neither the Supreme Court[301] nor this circuit[302] has regarded actions based on civil rights statutes as of such a special nature that recourse to state limitation periods is impermissible, and indeed, as the Supreme Court noted

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Note, Federal Statutes Without Limitations Provisions, 53 Colum. L. Rev. 68 (1953); see generally *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797 (1957).

[299] See *Republic Pictures Corp.* v. *Kappler*, 151 F.2d 543, 546-547, 162 A.L.R. 228 (8th Cir. 1945), *aff'd*, 327 U.S. 757, 66 S.Ct. 523, 90 L.Ed. 757 (1946), cited with approval in *Johnson* v. *Railway Express Agency*, *supra* note 112, 421 U.S. at 462 n.7, 95 S.Ct. at 1721 n.7, 44 L.Ed.2d at 302-303 n.7.

[300] The statutes cited to us by the parties contain two- or three-year limits. Since we remand to the District Court for a determination of which provision is appropriate to this case, we have no occasion to decide whether either of these periods is so short as impermissibly to frustrate the federal right of action asserted. We note, however, that other circuits adopting state rules for Title VII have applied periods of about that length. *EEOC* v. *Detroit Edison Co.*, *supra* note 289, 515 F.2d at 315 (three years); *United States* v. *Georgia Power Co.*, *supra* note 290, 474 F.2d at 924 (two years). See also *Runyon* v. *McCrary*, *supra* note 296, —— U.S. at ——, 96 S.Ct. at 2599-2600, 49 L.Ed.2d at 430-433.

[301] *Johnson* v. *Railway Express Agency*, *supra* note 112; *O'Sullivan* v. *Felix*, *supra* note 296.

[302] *Macklin* v. *Spector Freight Sys., Inc.*, *supra* note 112, 156 U.S.App.D.C. at 85 n.30, 478 F.2d at 985 n.30.

recently,[303] such a result may be required by federal statute.[304] Nothing about Title VII serves to distinguish it from those statutes; indeed, other circuits have invoked state rules to govern Title VII litigation.[305] On remand, the District Court must determine the local statute of limitations most appropriate to this case,[306] and its pro-

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[303] *Johnson* v. *Railway Express Agency*, *supra* note 112, 421 U.S. at 464, 95 S.Ct. at 1722, 44 L.Ed.2d at 303-304.

[304] 42 U.S.C. § 1988 (1970), which provides:

> The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this Title . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . .

Section 1988 is a product of the Reconstruction-era civil rights acts, and as such controls by its terms only rights of action predicated upon those statutes, *e.g.*, 42 U.S.C. §§ 1981-1983, 1985-1992 (1970). Without deciding whether § 1988 dictates recourse to state law in Title VII cases, we note that one court has so held. *Claiborne* v. *Illinois Cent. R.R.*, 401 F.Supp. 1022, 1026 (E.D. La. 1975) (applying state law on damages). But see *Rogers* v. *Exxon Research & Eng'r Co.*, 404 F.Supp. 324, 333 (D. N.J. 1975).

[305] See cases cited *supra* note 300.

[306] This is normally determined by reference to the law of the forum state. *United States* v. *Georgia Power Co.*, *supra* note 290, 474 F.2d at 923; 2 J. Moore, Federal Practice ¶ 3.07[2] (2d ed. 1948). See also *Runyon* v. *McCrary*, *supra* note 296, —— U.S. at ——, 96 S.Ct. at 2599-2600, 49 L.Ed. 2d at 430-433.

visions will serve as the outermost limit on awards of Title VII backpay.

The question, then, is whether the trial judge has discretion to shorten, within the statutory limits, the recovery period and, if so, whether it was properly exercised in this case. Unquestionably, the judge has discretion as to whether to award backpay, but that discretion is limited to exercises faithful to the goals of Title VII. Recently in *Albemarle Paper Co.* v. *Moody*,[207] the Supreme Court, called upon to clarify this discretionary power, noted that the "District Court's decision must be measured against the purposes which inform Title VII."[208] After observing that Congress patterned the backpay provision after a comparable provision in the National Labor Relations Act, and that Congress presumably was aware that backpay thereunder had been administratively awarded as a matter of course,[209] the

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[207] *Supra* note 174.

[208] *Albemarle Paper Co.* v. *Moody, supra* note 174, 422 U.S. at 417, 95 S.Ct. at 2371, 45 L.Ed.2d at 296.

[209] "The finding of an unfair labor practice and discriminatory discharge is presumptive proof that some back pay is owed by the employer," *NLRB* v. *Mastro Plastics Corp.*, 354 F.2d 170, 178 (CA 2 1965) [*cert. denied*, 384 U.S. 972, 86 S.Ct. 1862, 16 L.Ed.2d 682 (1966)]. While the backpay decision rests in the NLRB's discretion, and not with the courts, *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263, [90 S.Ct. 41[illegible] 420, 24 L.Ed.2d 405, 410-411] (1969), the Board has from its inception pursued "a practically uniform policy with respect to these orders requiring affirmative action." NLRB, First Annual Report 124 (1936). "[I]n all but a few cases involving discriminatory discharges, discriminatory refusals to employ or reinstate, or discriminatory demotions in violation of section 8(3), the Board has ordered the employer to offer reinstatement to the employee discriminated against and to make whole such employee for any loss of pay that he has suffered by

Court held that "backpay should be denied *only* for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[310] The presumption in favor of backpay is thus clear, and any denial must be well supported.[311]

While no court seems to have explicitly addressed the question whether there is power to limit as well as deny backpay, we believe the power exists. Justice Marshall, in his concurring opinion in *Albermarle*, assumed its existence; while expressing doubt that prejudice from a delayed request for backpay could be proved, he observed that even if it were shown that an earlier backpay claim would have inspired an "exercise [of] unusual zeal" in litigating the case, that would justify only a reduction in the award of backpay to reflect the earlier date at

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reason of the discrimination." NLRB, Second Annual Report 148 (1937).

Id. at 420 n.12, 95 S.Ct. at 2373 n.12, 45 L.Ed.2d at 298 n.12.

[310] *Id.* at 421, 95 S.Ct. at 2373, 45 L.Ed.2d at 299 (emphasis added). The Court held that good faith by the employer was no reason to deny backpay to the employee. That result "would read the 'make whole' purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in 'bad faith.'" *Id.* at 422, 95 S.Ct. at 2372, 45 L.Ed.2d at 299 (footnote omitted). The Court, however, left open the possibility of a denial based on laches; the plaintiffs had initially disclaimed any interest in backpay, asserting their backpay claim for the first time five years after the complaint was filed. *Id.* at 424, 95 S.Ct. at 2374-2375, 45 L.Ed.2d at 300-301.

[311] "It is necessary, therefore, that if a district court does decline to award backpay, it carefully articulate its reasons." *Id.* at 421 n.14, 95 S.Ct. at 2373 n.14, 45 L.Ed.2d at 299 n.14.

which the court would have awarded it.[312] Such power would also appear to be inherent in the "broad latitude" given district courts in fashioning relief.[313] As Justice Rehnquist stated in his concurring opinion in *Albermarle*,

> [i]f the award of backpay is indeed governed by equitable considerations, and not simply a thinly disguised form of damages, factors such as [reasonableness of delay and prejudice resulting], which may argue in favor of or against the equities of either plaintiff or defendants, must be open for consideration by the District Court. . . .[314]
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> [T]he backpay remedy provided by Title VII is modeled on the remedial provisions of the NLRA. This Court spoke to the breadth of the latter provision in *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 198 (1941), when it said: "[W]e must avoid the rigidities of an either-or rule. The remedy of backpay, it must be remembered, is entrusted to the Board's discretion; it is not mechanistically compelled by the Act. And in applying its authority over backpay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations." [315]

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[312] *Id.* at 441, 95 S.Ct. at 2384, 45 L.Ed.2d at 311 (Marshall, J., concurring).

[313] *Id.* at 443-444, 95 S.Ct. at 2385, 45 L.Ed.2d at 313 (Rehnquist, J., concurring); *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969).

[314] 422 U.S. at 446-447, 95 S.Ct. at 2387, 45 L.Ed.2d at 314-315.

[315] *Id.* at 444, 95 S.Ct. at 2385, 45 L.Ed.2d at 313. The description of the purpose behind the 1972 revision of the backpay provision emphasized the court's discretion. Senator Williams said the provision was

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Nevertheless, the power to limit backpay is subject to restraints. As a partial denial of backpay, authority to limit must be as narrowly constrained as authority to totally deny; its exercise, therefore, must be supported by reasons faithful to the dual purpose attributed to the backpay remedy by the *Albermarle* Court. Firstly, a "reasonably certain prospect of a backpay award '[provides] the spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" [316] Secondly, backpay "make[s] persons whole for injuries suffered on account of unlawful employment discrimination." [317]

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[315] [Continued]

> to give the court wide discretion, as has been generally exercised by the courts under existing law, in fashioning the most complete relief possible. In dealing with the present section 706(g) [42 U.S.C. § 2000e-5(g)] the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of but also requires that the consequence and effects of the unlawful employment practices be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. This broad reading of the need for effective remedies under this subsection is intended to be preserved in this bill in order to effectively combat the presence of employment discrimination.

Section-by-section analysis of S. 2515 by Senator Williams, 118 Cong.Rec. 4942 (1972); see also his statement *id* at 7168.

[316] 422 U.S. at 417-418, 95 S.Ct. at 2371-2372, 45 L.Ed.2d at 296-297, quoting *United States* v. *N. L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973).

[317] 422 U.S. at 418, 95 S.Ct. at 2372, 45 L.Ed.2d at 297.

By these standards, we deem the reasons given by the District Court inadequate. The fact that Congress decided to limit the recovery period for future backpay actions is not a sound basis for limiting the period in this action, for Congress deliberately chose not to apply the limitation to cases already in the courts.[318] Moreover, this generalized reason does not reflect consideration of the particular circumstances of the case. And while the court's second statement—that the two-year period appropriately measures the backpay recovery here—may indicate a focus on the equities of this case, it is not sufficiently detailed to permit competent review.[319] We are mindful of *Albermarle's* admonition that

> the courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases.[320]

Accordingly, we remand to allow the District Court to reconsider, in light of *Albermarle* and this opinion, the need to limit the backpay remedy here.[321]

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[318] See *id.* at 422 n.13, 95 S.Ct. at 2373 n.13, 45 L.Ed.2d at 298 n.13.

[319] See note 311 *supra*.

[320] 422 U.S. at 421-422, 95 S.Ct. at 2373, 45 L.Ed.2d at 299. Since one of the purposes of the two-year limitation was to "preclude the threat of enormous backpay liability which could be utilized to coerce employers and labor organizations into surrendering their fundamental rights to a fair hearing and due process," one may assume that Congress believed cases already in the courts were less in need of such protection. 117 Cong.Rec. 31981 (1971) (statement of Mr. Erlenborn). *Cf.* his remarks *id.* at 26555.

[321] Thus we dispose of NWA's contention that the District Court should have denied backpay entirely or should at

D. *The Title VII Class*

NWA next contends that the District Court erred in granting relief pursuant to Title VII in the form of backpay to stewardesses whose employment with the company terminated more than ninety days prior to the first filing by an employee of an unlawful-employment-practice charge with the Equal Employment Opportunity Commission. The relevant provision of Title VII [322] specifies, as a precondition to a later action in court, that "[a] charge . . . shall be filed [with the Commission] within ninety days after the alleged unlawful employment practice occurred." [323] It now appears settled that not all members of an employee class need file charges with the Commission in order to share in a recovery of backpay; [324] the purposes of the filing requirement—to give notice to the charged party and enable the Commission

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least have limited it to only 90 days. With *Rios* v. *Enterprise Ass'n Steamfitters, Local 638*, 400 F.Supp. 988, 992 (S.D. N.Y. 1975), relying on the District Court's decision in this case to limit an award to two years, we must respectfully disagree.

[322] In 1972, many of the time provisions of the Civil Rights Act of 1964 were expanded. The ninety-day time provision at issue in this case was increased to 180 days and reclassified as 42 U.S.C. § 2000e-5(e) (Supp. II 1972). The amended provision is not applicable to this case. See text *supra* at notes 287-289.

[323] 42 U.S.C. § 2000e-5(d) (1970). That section also sets forth the timing to be observed when the complaining party must file with a state or local agency before filing with the Commission.

[324] In *Albermarle Paper Co.* v. *Moody*, *supra* note 174, 422 U.S. at 414 n.8, 95 S.Ct. at 2370 n.8, 45 L.Ed.2d at 294 n.8, the Supreme Court indicated its agreement with courts which had considered the issue and had unanimously concluded that backpay might be awarded on a class basis without filings with the Commission by each member.

to conciliate—are adequately served by a timely filing by any member of the class.[325]

That filing, it seems clear, however, cannot revive claims which are no longer viable at the time of the filing.[326] Any other result would produce an anomaly. Time-barred members could not press their claims individually either before the Commission or judicial tribunals; and surely the employer's liability to them cannot be made to depend upon whether they come into court in a different character. True it is that class actions are liberally permitted in the federal courts,[327] but that procedural device cannot be used to expand substantive rights.[328] Not surprisingly, then, courts which have con-

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[325] "The purpose of [the filing requirement] is to provide for notice to the charged party and to bring to bear the voluntary compliance and conciliation functions of the [Commission]. Also, . . . another important function of filing the charge is to permit the [Commission] to determine whether the charge is adequate. Finally, the charge determines the scope of the alleged violation and thereby serves to narrow the issues for prompt adjudication and decision . . . .

"It is apparent that each of these purposes is served when any charge is filed and a proper suit follows which fairly asserts grievances common to the class to be afforded relief in the court. There can be no claim of surprise in such a situation. . . . '[N]o procedural purpose could be served by requiring scores of substantially identical grievances to be processed through [the Commission] when a single charge would be sufficient to effectuate both the letter and spirit of Title VII.'" *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969); see also *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968).

[326] See, *e.g.*, *Cohen* v. *District of Columbia Nat'l Bank*, 59 F.R.D. 84, 90 (D.D.C. 1972); *Lamb* v. *United Sec. Life Co.*, 59 F.R.D. 25, 35 n.5 (S.D Iowa 1972)

[327] Fed.R.Civ.P. 23.

[328] 28 U.S.C. § 2072 (1970), providing in part explicitly that the Federal Rules of Civil Procedure "shall not abridge,

sidered the question directly have uniformly held that only those employees who could have filed charges with the Commission individually when the class filing was made are properly members of the litigating class.[329]

It is contended, however, in support of the District Court's inclusion of the disputed class members within its Title VII award, that the Title VII violations complained of were of a continuing nature and thus that all past and present stewardesses could have made timely filings with the Commission when the filing for the class occurred. The District Court concluded that each of the violations was indeed continuing and that none was barred by the ninety-day provision.[330] We agree that where, as here, discrimination is not limited to isolated incidents but pervades a series or pattern of events which continue to within ninety days of the filing of the charge with the Commission, the filing is timely as to all similarly situated employees regardless of when the first discriminatory incident occurred.[331]

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enlarge or modify any substantive right. . . ." See also *United States* v. *Sherwood*, 312 U.S. 584, 590, 61 S.Ct. 767, 771, 85 L.Ed. 1058, 1063 (1941) (discussing the precursor of § 2072, the Act of June 19, 1934, 48 Stat. 1064); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9-10, 61 S.Ct. 422, 424-425, 85 L.Ed. 479, 482-483 (1941) (same); *Brennan* v. *Silvergate Dist. Lodge No. 50*, 503 F.2d 800, 804 (9th Cir. 1974).

[329] *Wetzel* v. *Liberty Mut. Ins. Co.*, 508 F.2d 239, 246 (3d Cir.), *cert. denied*, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975); *Mather* v. *Western Air Lines*, 59 F.R.D. 535 (C.D. Cal. 1973); *Marshall* v. *Electric Hose & Rubber Co.*, 68 F.R.D. 287, 294 (D. Del. 1975); *Jones* v. *United Gas Improvement Corp.*, 68 F.R.D. 1, 15-16 (E.D. Pa. 1975).

[330] *Laffey* v. *Northwest Airlines*, *supra* note 1, 366 F.Supp. at 790 (Concl. 6).

[331] *Macklin* v. *Spector Freight Sys., Inc.*, *supra* note 112, 156 U.S.App.D.C. at 77-78, 478 F.2d at 987-988; *Wetzel* v. *Liberty Mut. Ins. Co.*, *supra* note 329, 508 F.2d at 246; *Cox*

NWA does not dispute that the violations here are of a continuing kind. But NWA does contend that the discrimination could not be deemed continuing as to those who left the company's employ more than ninety days prior to the class filing with the Commission. We are in agreement with NWA on that score. A severing of the employment relationship ordinarily terminates a discrimination against the severed employee, and activates the time period for filing charges with the Commission concerning any violation which occurred at separation or which may have been continuing up to the date thereof.[332] To hold otherwise would effectively read the timely-filing requirement out of the statute.[333]

It is said, however, that NWA is estopped from asserting that employees terminated more than ninety days before the class filing should be excluded from the class recovery because the company was not timely in raising the issue and its untimeliness has prejudiced some individuals within the class. During the course of the proceeding, the District Court ordered class notices to be mailed to all stewardesses who were then or who had been employed by NWA at any time since the effective date of Title VII.[334] The notices informed these employees that they could file consents with the clerk of the court, in which case they would become members of the

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v. *United States Gypsum Co.*, 409 F.2d 289, 290-291 (7th Cir. 1969).

[332] *Wetzel* v. *Liberty Mut. Ins. Co.*, *supra* note 329, 508 F.2d at 246; *Terry* v. *Bridgeport Brass Co.*, 519 F.2d 806, 808 (7th Cir. 1975); *Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228, 1233-1234 (8th Cir. 1975); *Collins* v. *United Airlines*, 514 F.2d 594, 596-597 (9th Cir. 1975).

[333] *Collins* v. *United Airlines*, *supra* note 332, 514 F.2d at 596; *Olson* v. *Rembrandt Printing Co.*, *supra* note 332, 511 F.2d at 1234.

[334] J.App. 61-63.

classes for Equal Pay Act and Title VII relief.[335] The notices also advised that in the event that no consent was filed, the recipient "would be entitled to share in any money award which the court grants under the Civil Rights Act." [336] The employees alleged to have been prejudiced by NWA's omission to raise the issue, at the time the class was certified and the notices were mailed, are those who, if they had filed consents with the court, could have recovered under the Equal Pay Act but who did not so file.[337] Had these employees been informed that they could not recover under Title VII and that therefore their failure to file consents would preclude them from any recovery whatever, so the argument runs, they might have filed consents in order to obtain at least partial recovery of backpay pursuant to the Equal Pay Act.

If compliance with the ninety-day charge-filing requirement is jurisdictional, there can be no estoppel. Parties cannot waive subject matter jurisdiction by their conduct or confer it on the court by consent,[338] and the

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[335] J.App. 67-71. There was also a notice which was sent only to individuals whose employment terminated prior to a designated date. J.App. 63-67. That notice informed recipients of the class action and of their automatic inclusion in the Title VII class unless they opted to be excluded from the litigation. Those individuals could not share in the Equal Pay Act recovery because their respective claims were barred by the Act's statute of limitations. See note 199 *supra* and accompanying text.

[336] J.App. 69.

[337] This group can consist only of those whose employment with NWA was terminated between the earliest possible recovery date for Equal Pay Act violations and ninety days before the filing of charges with the Commission. Those who left the company's employ between those dates would be barred from a Title VII recovery but not from an Equal Pay Act recovery had they filed the consents.

[338] See, *e.g.*, *American Fire & Cas. Co.* v. *Finn*, 341 U.S. 6, 17-18, 71 S.Ct. 534, 541-542, 95 L.Ed. 702, 710-711 (1951);

absence of such jurisdiction can be raised at any time.[339] On the other hand, if timely filing with the Commission is not a jurisdictional step but is to be analogized to a statute of limitations, then an estoppel might possibly arise.[340]

The courts have not been uniform in their concept of the ninety-day period. Although the Supreme Court and this court—like most others—have referred to the timely-filing requirement as a jurisdictional prerequisite,[341] neither has ever had occasion to focus on the question whether courts are precluded from invoking traditional equitable doctrines to modify the requirement. When the issue has been considered, most courts have concluded

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Ahrens v. *Clark*, 335 U.S. 188, 193, 68 S.Ct. 1443, 1445-1446, 92 L.Ed. 1898, 1901-1902 (1948); *United States* v. *Griffin*, 303 U.S. 226, 229, 58 S.Ct. 601, 602-603, 82 L.Ed. 764, 766-767 (1938); *Green* v. *Obergfell*, 73 App.D.C. 298, 306-307, 121 F.2d 46, 54-55, *cert. denied*, 314 U.S. 637, 62 S.Ct. 72, 86 L.Ed. 511 (1941).

[339] See, *e.g.*, *Flast* v. *Cohen*, 392 U.S. 83, 88 n.2, 88 S.Ct. 1942, 1946 n.2, 20 L.Ed.2d 947, 955 n.2 (1968); *United States* v. *Griffin*, *supra* note 338, 303 U.S. at 229, 58 S.Ct. at 602-603, 82 L.Ed. at 766-767; *Fortier* v. *New Orleans Nat'l Bank*, 112 U.S. 439, 444, 5 S.Ct. 234, 236, 28 L.Ed. 764, 765-766 (1884); *James* v. *Lusby*, 162 U.S.App.D.C. 352, 356, 499 F.2d 488, 492 (1974).

[340] *Glus* v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed.2d 770 (1959), where a limitation period was contained in the statute creating a new right, and thus historically was to be seen as a limitation on the right itself, and the Court held that the defendant could be estopped from asserting the limitation as a defense.

[341] See *Alexander* v. *Gardner-Denver Co.*, *supra* note 96, 415 U.S. at 47, 94 S.Ct. at 1019, 39 L.Ed.2d at 157-158; *McDonnell Douglass Corp.* v. *Green*, 411 U.S. 792, 798, 93 S.Ct. 1817, 1822, 36 L.Ed.2d 668, 675-676 (1973); *Macklin* v. *Spector Freight Sys., Inc.*, *supra* note 112, 156 U.S.App. D.C. at 76, 478 F.2d at 986.

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that equitable principles can be used to extend the time period in deserving cases.[342] Thus several circuits have held that since private settlement of claims is a major goal of Title VII and the pursuit of contractual grievance procedures furthers that goal, the time provision is tolled while an employee pursues his contractual grievance remedies.[343] Similarly, the Fifth Circuit has stated that the time limitation must sometimes be modified to further the broad remedial purposes of Title VII. It held that the ninety-day period did not start until the facts supporting the charge of discrimination would or should have been known to an employee "with a reasonably prudent regard for his rights similarly situated to the plaintiff." [344]

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[342] *Reeb* v. *Economic Opportunity, Atlanta Inc.*, 516 F.2d 924 (5th Cir. 1975); *Franks* v. *Bowman Transp. Co.*, 495 F.2d 398 (5th Cir. 1974), *aff'd in part and rev'd in part*, —— U.S. ——, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *Culpepper* v. *Reynolds Metal Co.*, 421 F.2d 888 (5th Cir. 1970); *Malone* v. *North Am. Rockwell Corp.*, 457 F.2d 779 (9th Cir. 1972); *Sanchez* v. *Trans World Airlines*, 499 F.2d 1107 (10th Cir. 1970).

[343] See, *e.g.*, *Sanchez* v. *Trans World Airlines*, *supra* note 342; *Moore* v. *Sunbeam Corp.*, 459 F.2d 811, 826-827 (7th Cir. 1972); *Malone* v. *North Am. Rockwell Corp.*, *supra* note 342; but see, *Guy* v. *Robbins & Myers, Inc.*, 525 F.2d 124 (6th Cir. 1975), *cert. granted*, —— U.S. ——, 96 S.Ct. 1723, 48 L.Ed.2d 193 (1976).

[344] *Reeb* v. *Economic Opportunity, Atlanta Inc.*, *supra* note 342, 516 F.2d at 931. In reaching its decision the court relied in part on a prior decision of the Fifth Circuit, *Franks* v. *Bowman Transp. Co.*, *supra* note 342, wherein the court held that constructive receipt of a "right to sue" letter was inadequate to start the running of the time period within which the claimant had to file his court action. The court ruled that only actual notice would set the time period in motion because "Congress did not intend to condition a claimant's right to sue under Title VII on fortuitous circumstances or events beyond his control which are not spelled out in the statute." 495 F.2d at 404.

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We need not indicate a view on specific equitable modifications which the courts have seen fit to make. But we are in accord with the principle that the time provisions of Title VII are subject to equitable modification. Nothing in the legislative history compels us to treat those provisions as jurisdictional; on the contrary, the legislative history, although very limited on the time provisions, suggests that Congress intended them to operate similarly to statutes of limitations.[345] Therefore, to modify these time provisions to serve the dictates of sound equitable considerations would not seem to be inconsistent with congressional intent.

Equally importantly, where congressional purpose is unclear, courts have traditionally resolved ambiguities in remedial statutes in favor of those whom the legislation was designed to protect.[346] As the Supreme Court has declared, procedural "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." [347] In-

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[345] Senator Case, one of the floor managers in the Senate of the House bill, H.R. 7152, stated that the six-month limit on filing with the Commission contained in that bill was "to avoid the pressing of 'stale' claims." 110 Cong.Rec. 7243 (1964). Senator Humphrey, commenting on the differences between H.R. 7152 and the substitute Senate bill, S. 656, which was eventually passed by the Senate, referred to its ninety-day time period as a "period of limitations." *Id.* at 12723.

[346] *Beverly* v. *Lone Star Lead Constr. Corp.*, 437 F.2d 1136, 1138 (5th Cir. 1971); *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 461 (5th Cir. 1970); *Harris* v. *Walgreen's Dist. Center*, 456 F.2d 588, 591 (6th Cir. 1972).

[347] *Love* v. *Pullman*, 404 U.S. 522, 527, 92 S.Ct. 616, 619, 30 L.Ed.2d 679, 685 (1972). As we have already noted, the Supreme Court has held that not all members of a class need to individually file with the Commission. See note 324 *supra*. This is some indication that the Court does not regard the act of filing as a jurisdictional prerequisite.

deed, only recently, in *Coles* v. *Penny*,[348] we ourselves observed that provisions in Title VII "require an interpretation animated by the broad humanitarian and remedial purposes underlying the federal proscription of employment discrimination." [349] While we declined in *Coles* to determine whether Title VII's time provisions are jurisdictional or nonjurisdictional, we cited with approval cases which have permitted equitable modifications of those provisions.[350] We hold that Title VII's ninety-day provision for the filing of charges with the Commission is not a jurisdictional absolute.[351]

We now return to the question whether NWA is estopped from raising the defense of untimeliness of the filing of charges in this case. NWA conceded in the Dis-

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[348] *Supra* note 228.

[349] *Coles* v. *Penny*, *supra* note 228, —— U.S.App.D.C. at ——, 531 F.2d at 616 (footnote omitted).

[350] *Id.*

[351] Our holdings find support in the interpretation the courts of appeals have uniformly given to comparable time provisions in the National Labor Relations Act, 29 U.S.C. § 160(b) (1970). Section 160(b) provides in part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge." The courts that have construed this provision have all concluded that it is a statute of limitations, not a limitation on the jurisdiction of the National Labor Relations Board. See *NLRB* v. *A. E. Nettleton Co.*, 241 F.2d 130, 133 (2d Cir. 1957); *Shumate* v. *NLRB*, 452 F.2d 717, 720 (4th Cir. 1971); *NLRB* v. *Itasco Cotton Mfg. Co.*, 179 F.2d 504, 506-507 (5th Cir. 1950); *NLRB* v. *Local 264, Laborers' Int'l Union*, 529 F.2d 778, 781-785 (8th Cir. 1976). The analogy to the National Labor Relations Act is particularly significant in light of the Supreme Court's reliance on it when interpreting Title VII. *Franks* v. *Bowman Transp. Co.*, *supra* note 342, —— U.S. at ——, 96 S.Ct. at 1267, 47 L.Ed.2d at 465-466; *Albermarle Paper Co.* v. *Moody*, *supra* note 174, 422 U.S. at 419-421, 95 S.Ct. at 2372-2373, 45 L.Ed.2d at 297-299.

trict Court that through inadvertence it had omitted to defensively plead the ninety-day provision as a statute of limitations.[332] Even now, NWA does not claim that it posed any objection on account of that provision prior to trial.[333] By the time NWA raised the issue of untimeliness, notice had already gone out to class members informing them that they need not do anything to join in any recovery which the court might order under Title VII. It is evident that some members may have been lulled into inaction on their Equal Pay Act rights in the understanding that they would share in any Title VII recovery. It would be inconsistent with the broad remedial purposes of Title VII to foreclose them from recovery thereunder. We conclude, then, that while the District Court on remand must exclude from the Title VII recovery those employees whose connection with NWA was dissolved more than ninety days before the class filing with the Commission, the court must retain in the class for the Title VII recovery those employees who would have brought themselves within the Equal Pay Act class by filing consents.

E. *Longevity*

The last remedy-issue raised by NWA is that the District Court erred in equating longevity with seniority for pay purposes. The court's judgment provides for (a) salaries, as prescribed in the purser pay-scale, for all female cabin attendants, "[t]he longevity of each . . . for purposes of applying the purser pay scale [to] be her system seniority," [334] and (b) backpay for both the

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[332] Trial Tr. at 3571.

[333] Company-Appellants Combined Reply Brief and Brief on Cross-Appeal at 33.

[334] *Laffey* v. *Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1385.

Equal Pay Act and the Title VII plaintiffs, calculated at "the difference between the salary actually paid to her . . . and the salary . . . which would have been paid to her had she been compensated as a purser with longevity for pay purposes equal to her system seniority." [355] NWA insists that longevity and seniority are computed differently—longevity as representing the days of actual service and seniority as merely reflecting the hiring date—and that longevity rather than seniority fixes the appropriate step on the salary schedule. NWA's contention is not disputed. It is argued, however, that NWA should have raised the point before the judgment was entered, and not by a post-judgment motion, and that there is no evidence in the record to either support or refute NWA's position. But we must remand this case anyway, and we discern no reason why the District Court should not then afford NWA an opportunity to prove its point. Since no one was prejudiced by NWA's somewhat delayed objection, reconsideration of the matter would better serve the ends of justice. And since a quick look at the collective bargaining agreement should answer the question, no additional delay should be entailed. The remedial order in this case is to make employees whole, but not more than whole.

VI. The Unions

After entry of the District Court's judgment, NWA moved, pursuant to Civil Rule 15(b),[356] to amend its answer by inclusion of a request for realignment of the Air Line Pilots Association, International (ALPA) from a non-aligned party status to a defendant; and to assert a cross-claim demanding contribution or idemnification from ALPA for any liability NWA might have to em-

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[355] *Id.* at 1385-1386.

[356] Fed.R.Civ. P. 15(b), quoted in relevant part *infra* text at note 364.

ployees under the Equal Pay Act or Title VII, and a claim for damages under the Equal Pay Act for allegedly causing NWA to violate it. NWA also moved, pursuant to Civil Rule 14(a),[357] for leave to serve a third-party complaint on the Transport Workers Union of America (TWU), seeking similar relief from that union.

At the time the instant suit began, TWU was the certified bargaining representative of NWA's cabin attendants. Later, its status as such was challenged and ALPA became the certified representative. NWA's motions were filed almost four years after the action was commenced, more than three years after NWA had answered the complaint, almost one and one-half years after trial was completed and, as previously indicated, several months after the court rendered its findings and judgment. The District Court denied both motions[358] and NWA appeals the denials.

Rule 14(a) specifies the manner in which a third party may be impleaded by a defendant.[359] If the third-party complaint is filed within ten days of the defendant's answer, leave of the court is not required, but after that the defendant must obtain leave.[360] The decision on the motion resides in the trial court's discretion

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[357] Fed.R.Civ. P. 14(a), quoted in relevant part *infra* note 359.

[358] J.App. 339-340.

[359] "At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. . . ." Fed.R.Civ. P. 14(a).

[360] See note 359 *supra*.

and our role is to review simply for abuse or legal error.[361] The denial of the motions here clearly was neither.

Instead of effectuating the purposes of Rule 14—avoiding circuity of actions[362]—a grant of the motions would have defeated that goal. To have reopened the litigation at the point NWA sought it would not only have been judicially uneconomical but would also have inflicted a hardship on the parties. NWA has established no excuse for the long delay in attempting to bring TWU into the case.[363]

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[361] *General Taxicab Ass'n* v. *O'Shea*, 71 App.D.C. 327, 329, 109 F.2d 671, 673 (1940); *Farmers & Merchants Mut. Life Ins. Co.* v. *Pulliam*, 481 F.2d 670 (10th Cir. 1973); *Kopan* v. *George Washington Univ.*, 67 F.R.D. 36, 38 (D.D.C. 1975). See *East Hampton DeWitt Corp.* v. *State Farm Mut. Auto Ins. Co.*, 490 F.2d 1234, 1246 (2d Cir. 1973). *Cf. Southern Ry. Co.* v. *Fox*, 339 F.2d 560, 563 (5th Cir. 1964).

[362] *Merritt-Chapman & Scott Corp.* v. *Frazier*, 289 F.2d 849, 856 (9th Cir.), *cert. denied*, 368 U.S. 835, 82 S.Ct. 60, 7 L.Ed.2d 36 (1961); *United States Fidelity & Guar. Co.* v. *Perkins*, 388 F.2d 771, 773 (10th Cir. 1968); *Kopan* v. *George Washington Univ.*, *supra* note 361, 67 F.R.D. at 38. See generally 3 J. Moore, Federal Practice ¶ 14.04 (2d ed. 1948); 6 C. Wright & A. Miller, Federal Practice § 1442 (1971).

[363] Compare *East Hampton DeWitt Corp.* v. *State Farm Mut. Auto. Ins. Co.*, *supra* note 361, where a defendant attempted to serve a third-party complaint under Rule 14 on the plaintiff in the litigation shortly before the trial date. The motion was denied, and the court found no reason to disturb the ruling of the trial judge, who was found to have acted well within his discretion. *Id.* at 1246. Accord, *Merritt-Chapman & Scott Corp.* v. *Frazier*, *supra* note 362; *General Elec. Co.* v. *Irvin*, 274 F.2d 175, 178 (6th Cir. 1960) ("the timeliness of the motion is an urgent factor governing the exercise of [Rule 14] discretion"). Given this case law, it must be said *a fortiori* that a motion under Rule 14(a) made more than a year and a half after the completion of trial and found by the trial judge to be untimely is rarely to be disturbed on appeal.

NWA's effort vis-a-vis ALPA invoked Rule 15(b), which in pertinent part provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." [364] Thus NWA's motion to amend its answer to incorporate a cross-claim against ALPA for contribution or indemnification and a separate claim for damages presumes that these issues were tried by implied consent of the parties. This seems manifestly to be an erroneous assumption. After ALPA was certified as exclusive bargaining representative of the cabin attendants in the stead of TWU, the employees moved to join ALPA as a party "solely for the limited purpose of assuring that the court will have before it all the parties necessary to effectuate relief," [365] noting explicitly that they "do not contend that ALPA has in any respect violated" the law.[366] Since they deemed ALPA "not responsible for any of the discrimination" [367] alleged, they did not seek to join ALPA as a defendant. By letter to the District Court NWA advised that it had no objection to the employees' motion, and directed ALPA to indicate how it wished to be aligned with respect to the issues. ALPA responded that it wished to proceed as a non-aligned party as it did not "possess sufficient knowledge or information to align itself on the issues," [365] and there was no opposition to ALPA's entry as such. At the trial, which extended over a five-week period, counsel for ALPA appeared only on two days—"the first day of trial, and on one other

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[364] Fed.R.Civ.P. 15(b).

[365] Supp. App. to Brief of Airline Pilots Association, International at 3-4, hereinafter cited "Supp. App."

[366] Supp. App. 2.

[367] Supp. App. 4.

[365] J.App. 76.

occasion at the close of the trial to indicate a potential desire to present evidence; no further appearance was made and no evidence was presented." [369]

We cannot detect in this scenario any implied consent by ALPA to litigate any issue of liability to NWA. The question whether an issue has been tried by consent is a matter committed largely to the trial court's discretion and will not be reversed except upon a showing of abuse.[370] Clearly there was no abuse here.

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[369] *Laffey* v. *Northwest Airlines*, *supra* note 1, 366 F.Supp. at 764.

[370] Once an issue has been tried by express or implied consent of the parties, Rule 15(b) requires it be treated as if raised by the pleadings. *Rosden* v. *Leuthold*, 107 U.S.App.D.C. 89, 92, 274 F.2d 747, 750 (1960). Where the question is whether that is the case, however, the essential inquiry is the understanding of the parties as to whether the unpleaded issue was being contested. *MBI Motor Co.* v. *Lotus East, Inc.*, 506 F.2d 709, 711 (6th Cir. 1974). See *Joiner Sys., Inc.* v. *AVM Corp.*, 517 F.2d 45, 49 (3d Cir. 1975). See also *Kanelos* v. *Kettler*, 132 U.S.App.D.C. 133, 136-137 n.15, 406 F.2d 951, 954-955 n.15 (1968). The trial judge's answer to that inquiry is reviewable only for abuse of discretion. *Macris* v. *Sociedad Maritima San Nicolas*, 245 F.2d 708, 711 (2d Cir. 1957), *cert. denied*, 355 U.S. 922, 78 S.Ct. 364, 2 L.Ed.2d 353 (1958); *Cole* v. *Layrite Prods. Co.*, 439 F.2d 958, 961 (9th Cir. 1971). *Cf. Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 330, 91 S.Ct. 795, 802, 28 L.Ed.2d 77, 87 (1971); *Foman* v. *Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 225-226 (1962)—on the discretion enjoyed by the trial judge under Rule 15(a). He is in a far better position than we to determine the understanding under which the parties proceeded. Where the new issue or theory is raised only after trial, courts of appeals have been loathe to overturn the decision of the trial judge that it was not tried by consent. *E.g.*, *Macris* v. *Sociedad Maritima San Nicolas*, *supra*; *Bettes* v. *Stonewall Ins. Co.*, 480 F.2d 92, 94 (5th Cir. 1973); *Saalfrank* v. *O'Daniel*, 533 F.2d 325, 330 (6th Cir. 1976). *Cf. Tasty Baking Co.* v. *Cost of Living Council*, 529 F.2d 1005, 1011 (Temp. Emergency Ct. App. 1975). *Saalfrank*, *supra*, is par-

For the reasons articulated herein, we vacate the provisions of the District Court's judgment pertaining to the questions of good faith,[371] recovery period [372] and eligible class-members [373] arising under Title VII, and remand the case to that court for reconsideration thereof. To the extent indicated herein, other matters may appropriately be addressed to the court on remand. In all other respects, we affirm the judgment.

So ordered.

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ticularly persuasive here. There the plaintiff sought to realign parties after trial to place a party theretofore liable only as an indemnitor in a position of direct liability. The trial judge's refusal was sustained on appeal, the court noting that though "[i]n certain circumstances Rule 15 . . . may be availed of to permit an amendment after judgment and a realigning of parties . . . this may only be done if all parties have notice of the issues being tried and no prejudice will result." 533 F.2d at 330. Possible prejudice was found in the indemnitor's waiver of jury trial. *Id. Cf. Komie* v. *Buehler Corp.*, 449 F.2d 644, 648 (9th Cir. 1971) (Rule 15(a) motion to amend denied where failure to raise issue earlier prejudiced party vis-a-vis discovery).

[371] See Part V(B) *supra.*

[372] See Part V(C) *supra.*

[373] See Part V(D) *supra.*

APPENDIX C
FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE DISTRICT COURT

United States District Court
FOR THE DISTRICT OF COLUMBIA

Civ. A. No. 2111-70

MARY P. LAFFEY et al.,

Plaintiffs,

v.

NORTHWEST AIRLINES, INC.,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter came on for trial before the undersigned Judge of the above Court commencing on December 4, 1972, and continuing thereafter until January 10, 1973.

Michael H. Gottesman, Esquire and Dennis D. Clark, Esquire of Bredhoff, Barr, Gottesman, Cohen & Peer appeared for the Plaintiffs. Gilbert Feldman, Esquire of Kleiman, Cornfield and Feldman, counsel for Air Line Stewards and Stewardesses Association, International, Transport

Workers Union of America, AFL-CIO, appeared for a portion of the trial on behalf of the Plaintiffs. Henry Halladay, Esquire and David A. Ranheim, Esquire of Dorsey, Marquart, Windhorst, West & Halladay, appeared for the Defendant, Donald J. Capuano, Esquire of O'Donoghue & O'Donoghue appeared for Air Line Pilots Association, International on the first day of trial, and on one other occasion at the close of trial to indicate a potential desire to present evidence; no further appearance was made and no evidence was presented by Air Line Pilots Association, International. Karl W. Heckman, Esquire of the United States Department of Labor appeared for portions of the trial; no evidence was presented by the Department of Labor.

Based upon the oral testimony at trial, the designated deposition testimony submitted to the Court, exhibits introduced by both parties, and all of the files, records and proceedings herein, the Court duly advised in the premises, in accordance with Rule 52 of the Federal Rules of Civil Procedure, makes and enters its Findings of Fact, Conclusions of Law and Order for Judgment as follows:

FINDINGS OF FACT

1. The named Plaintiffs are [or were] female cabin attendant employees of Northwest Airlines, Inc. [hereinafter "NWA" or "the Company"], and this action has been certified as a class action on behalf of all NWA female cabin attendants employed at any time from July 2, 1965 to the present.

2. The Defendant, NWA, is an air carrier which was formed in 1926, and it currently maintains its corporate headquarters and main base at the Minneapolis-St. Paul International Airport in Minnesota.

3. NWA first began passenger service between Minneapolis-St. Paul and Chicago, and from 1927 to 1946, extended its routes to other cities in the continental United States. Virtually all of NWA's flights cross state lines, and it is engaged in interstate commerce. In 1947 NWA began scheduled service to the Orient, and since that date has increased the number of its routes within and without the continental limits of the United States. NWA has used various types of equipment to fly these routes over the years, including (1) propeller driven equipment [DC-4, Stratocruiser, DC-6, DC-7] accommodating between approximately 25 and 100 passengers with a cabin crew complement of two or three, (2) jet equipment [DC-8, 727, 720B, 707-320] accommodating between approximately 100 and 150 passengers with a cabin crew complement of five, and (3) the new wide-bodied jet equipment, including the 747 and the DC-10, carrying as many as 362 passengers with a cabin crew complement of as many as sixteen.

4. NWA's international operations are extremely competitive, much more so than its domestic operations. There is no significant market in NWA's international system that is not competitive with at least two or more international carriers. Most of these carriers are significantly larger than NWA and also have the competitive advantage of operating around the world, thus being able to carry through-traffic beyond the New York and Hong Kong termination points of NWA's system.

5. In a normal year not subject to the impact of a strike, NWA handles approximately seven million passengers producing gross revenues of approximately $450 million. This ranks NWA approximately seventh among the eleven trunk

carriers in the United States. From 1968 through 1970, NWA lead all United States air carriers in annual net profits, earning between 44.5 and 51.5 million dollars per year. In 1971, NWA was second in net profits with nearly 21.5 million dollars, the drop being attributed to the effects of a labor strike in the latter part of 1970.

6. All cabin attendants employed by NWA between 1927 and 1947 were females classified as stewardesses. The company has continued to employ females in the stewardess classification up to and including the present time. In 1947, the Company established a cabin attendant classification purser. From 1947 through June 15, 1967, the Company followed an express policy of confining the purser job solely to males. In 1949, the Company established a cabin attendant classification of flight service attendant (FSA), which has always been filled exclusively by males. The FSA classification was established when the Company began utilizing a plane called the Boeing Stratocruiser, which had a sunken bar lounge. The Company decided that a male cabin attendant should be assigned to the bartending function (as well as other cabin attendant duties) on this plane. Except for the cocktail service on this plane, FSAs were hired to perform the same duties that female stewardesses performed.

7. On December 17, 1946, the National Mediation Board certified Air Line Stewards and Stewardesses Association, International (hereinafter "ALSSA") as the duly designated collective bargaining representative of NWA's female cabin attendants. This certification subsequently was amended on October 22, 1948, to provide that ALSSA also was the duly designated representative of NWA's pursers, and again on June 20, 1950, to provide the same represen-

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tative for NWA's male cabin attendants. On July 7, 1961, ALSSA having affiliated with the Transport Workers Union of America, AFL-CIO, the National Mediation Board certified "Air Line Stewards and Stewardesses Association, International, Transport Workers Union of America, AFL-CIO" as the duly designated representative of all cabin attendant and purser employees of NWA. In 1971 NWA's cabin attendants and pursers voted to replace ALSSA with Air Line Pilots Association, International (hereinafter "ALPA") as their representative, and the National Mediation Board so certified on September 17, 1971. ALPA has joined this action as a "non-aligned party."

8. At all times the membership of NWA's cabin attendant class or craft (including pursers) represented by ALSSA or ALPA has been predominantly female, so that females always have and still do possess a clear numerical superiority over males in the affairs of the class or craft and the union representative. The members are called upon to vote for their representatives within the internal union structure, to state their views and proposals in connection with collective bargaining, to ratify new agreements, and otherwise to participate in the process by which their rates of pay, rules and working conditions are established.

9. At all times from December 17, 1946 to date, NWA has entered into collective bargaining negotiations and agreements with the certified union representative, ALSSA or ALPA, pursuant to the mandate of and the procedures outlined in the Railway Labor Act, 45 U.S.C. §151 et seq. The agreements have covered all United States-based cabin attendants and pursers, but not those based in the Orient and assigned exclusively to flights within the Orient ["interport"].

10. Since at least 1943, NWA has employed female cabin attendants as "stewardesses." In the first collective bargaining agreement, dates September 19, 1947, a "stewardess" was defined as:

> . . . an employee who is responsible for the performing or assisting in the performance of all enroute cabin service, or ground service, to delayed or canceled passengers, and shall include the responsibility for the welfare, comfort, enjoyment and safety of the passengers, as prescribed by the Company regulations.

A salary was established for that position. The definition has continued to the present, and the salary has increased over time by union negotiation and agreement.

11. In 1947 when NWA obtained and began flying routes to and through the Orient [see Finding 3], the purser classification was established. In the first collective bargaining agreement including pursers, dated January 1, 1949, the position of "flight purser" was defined as follows:

> "Flight Purser" means an employee on the international division whose work includes performing and assisting in the performance of all enroute cabin service, attending to passenger comfort, responsibility for the preparation and completion of passenger, crew, and cargo manifests and other reports and documents as may be required by the Company or by law. A flight purser may be designated to perform necessary duties in connection with flight cargo operations, may be designated as being in charge of other cabin attendants, may be required to accept special assignments related to flight purser duties, and from time to time may be requested to participate in publicity and promotional assignments not in violation of any of the terms of this Agreement.

The definition of a "purser" has continued to the present time. A salary was established for the purser position at a rate higher than that for the stewardess position. The salary for the position has increased over time pursuant to union negotiation and agreement.

12. In 1949 NWA began hiring male cabin attendants as "flight service attendants" [FSA's] to fly particularly on the Boeing Stratocruiser aircraft. They were to perform essentially the same duties as female cabin attendants on those and other flights. Effective with the 1951 collective bargaining agreement, FSA's were included in the definition of "Stewardess" appearing in the earlier agreements, which was carried forward thereafter.

13. Beginning with the 1951 collective bargaining agreement and continuing thereafter to date, a combined purser-FSA seniority list was created by virtue of which FSAs began accruing seniority as pursers immediately upon commencing their duties as FSAs.

14. From 1951 until the June 15, 1967 collective bargaining agreement, FSAs had a contractual right to fill purser vacancies in seniority order. From 1951 on, as permanent vacancies in the purser position arose, notices of the purser vacancies were posted, addressed only to male employees. At no time did the Company fail to award a purser vacancy to the most senior FSA bidding for it. The Company's policy was that any FSA who had successfully completed his FSA probationary period was thereby deemed qualified for purser vacancies.

15. As temporary vacancies in purser positions arose, FSAs were temporarily elevated to fill such vacancies and received purser pay for doing so. When they were promoted

to permanent purser positions, they received credit on the purser pay scale for the time spent filling temporary purser vacancies.

16. FSAs who chose to pass up promotional opportunities to purser and then later promoted to purser jumped ahead for all seniority purposes, of junior employees who had been promoted ahead of them.

17. The Company hired its last FSA in 1957 (the discontinued use of the Boeing Stratocruiser having eliminated the Company's interest in having FSAs). Between 1957 and 1964 all purser vacancies were filled by the promotion of FSAs in the manner described above. By mid-1964, the Company had exhausted the supply of FSAs who desired elevation to purser positions. As subsequent purser vacancies arose, the Company invoked its contractual right to transfer "the most junior employee" to force the remaining few FSAs who were based in Minneapolis to transfer to the Seattle base and fill purser vacancies. By May 1965, there remained only three FSAs, all voluntarily based in Honolulu flying on military charter flights for the United States Government, certain of which required the use of male cabin attendants only.

18. As of May 1, 1965, just prior to the effective date of Title VII of the Civil Rights Act of 1964, the Company employed 48 male pursers, no female pursers, three male FSAs, and 724 female stewardesses.

19. The last purser was hired by the Company on April 25, 1970. As of that date, the Company employed 137 male cabin attendants, all as pursers, and 1,747 female cabin attendants, all but one classified as stewardesses. (The single female purser was Mary P. Laffey, who was promoted

from the classification of stewardess effective October 4, 1967.

20. Between May 1, 1965, and May 1, 1970, the Company hired 118 new male cabin attendants, all of them as pursers. During the same period, it hired 2,224 new female cabin attendants, all of them as stewardesses.

21. Recently, NWA has hired several male cabin attendants as "stewards" to perform the same duties as stewardesses and FSA's and at the same union negotiated and agreed upon rate of pay. At all times from 1949 to the present, FSA's and stewards have been compensated at the same rate as stewardesses of equal longevity. The single compensation schedule provided by union contract for the cabin attendant classification establishes periodic increments based upon accumulated longevity in that classification. In addition to the basic compensation, cabin attendants engaged in "foreign flying" [flights to or from foreign countries, Alaska or Hawaii, excluding Winnipeg, Canada] have been compensated either according to a separate schedule at a higher rate or according to a specific hourly supplement. Pursers receive no such supplement.

22. The Company and ALSSA engaged in collective bargaining negotiations in 1963 and 1964, from which eventuated the 1964 collective bargaining agreement. In those negotiations, ALSSA sought a provision which would permit stewardesses to progress to purser vacancies in seniority order after the last FSA who desired to become a purser had done so. The Company refused to agree to this proposal and it was not included in the 1964 agreement.

23. In 1966 and 1967, the Company and ALSSA

engaged in the next round of collective bargaining negotiations eventuating in the agreement which became effective June 15, 1967. One of the Company's opening proposals was that a single "cabin attendant" classification be established, in lieu of the three classifications of purser, FSA and stewardess, and that the rate of pay for this single classification be the rate then paid to stewardesses and FSA's. The Union opposed this proposal, and it was not adopted. One of ALSSA's proposals was that stewardesses be permitted to progress to the position of purser in seniority order, as FSA's had in the past. The Company refused to accept ALSSA's proposal, but stated that it would agree to a provision permitting stewardesses to bid for purser vacancies if the Company was allowed a right of "selectivity." ALSSA acceded to the Company's proposal because it was convinced that it was the most it could achieve. The provision as it appeared in the 1967 agreement provided:

> "d. Employees will be notified by posting on the bulletin board of any vacancies occurring within the purser classification. Stewardesses and flight service attendants will be given consideration if they make written application for any such positions. In considering the applications the Company will give consideration, among others, to the employee's past service record, length of service, leadership ability, and test results." P-79, Sec. 9(d)).

This provision replaced the following clause which had appeared in the 1964 agreement, as well as the preceding agreements:

> "d. Flight service attendants will be given an opportunity to qualify as a flight purser at any time the Company desires provided that all promotions to the

status of flight purser shall be in the order of their seniority subject to the provisions of this section."

24. The opportunity for stewardesses to seek purser vacancies under the 1967 agreement differed from the manner in which FSAs previously filled such vacancies in the following additional respects:

(a) The 1967 agreement contained a review procedure for stewardesses whose bids for purser vacancies were denied, but that procedure was available only to stewardesses who had "at least four (4) years of service with the Company on flights to which a purser has been assigned." The Company insisted on this limitation to discourage bids for purser vacancies by stewardesses who did not have four years' flying with a purser. A majority of the Company's male pursers became pursers without having flown for four years on flights with a purser.

(b) Whereas the probationary period in the 1964 agreement and in the agreements prior thereto had been "the first four (4) months of service as a flight purser," the provision was changed in the 1967 agreement, at the Company's insistence, to "the first six (6) months of service as a flight purser."

(c) The 1967 agreement left intact the combined FSA-purser seniority list. The effect of this was that stewardesses becoming pursers would go to the bottom of the purser seniority list, whereas both before and after 1967 FSAs who became pursers received credit for their years of FSA service on the purser seniority list. Seniority on the purser seniority list determines the order of bidding for schedules, vacation preference, the order in which

pursers are laid off and recalled during reductions in force and restorations in force, and priority in obtaining voluntary transfers to other bases. Additionally, those at the bottom of the purser seniority list are subject to involuntary transfers from one base to another. The most junior employees on the purser seniority list usually wind up with "reserve" schedules. Reserve schedules are generally considered the least desirable, as the employee has no choice of itinerary and must remain available at his telephone for most of the month to be summoned on short notice.

(d) Although FSAs who had completed their probationary period were deemed qualified for purser vacancies under the pre-1967 agreements, no similar policy was applied with respect to stewardesses bidding under the 1967 agreement.

(e) Following the signing of the 1967 agreement, the Company decided to "upgrade" its standards for selecting pursers, and to place greater emphasis on the qualities of supervisory capacity and leadership ability than it had in the past. As part of this greater emphasis on supervisory capacity, the Company decided to begin utilizing tests which had not previously been utilized in the selection of pursers. None of the tests administered to applicants for any cabin attendant positions prior to 1967 had been utilized by the Company to measure supervisory potential or supervisory capacity. When FSAs progressed to purser prior to 1967, they took no tests as a prerequisite to becoming a purser; following the signing of the 1967 agreement, however, stewardesses seeking purser positions were subjected to tests.

25. Stewardesses have been deterred from bidding for purser vacancies since 1967 because:

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(a) Under the terms of the agreement they would go to the bottom of the purser seniority list, have last choice in selecting schedules, have to fly reserve, have last choice in selecting vacation time, be the first laid off in a reduction in force, and be subject to involuntary transfers to other bases.

(b) If they are senior, under the terms of the agreement they would not receive any greater pay for a substantial period of time than they would receive by remaining a stewardess.

26. Following the signing of the 1967 agreement, the NWA personnel office was instructed to consider stewardesses for purser vacancies. It was not told to consider female applicants other than stewardesses and it never did. Despite a lack of well qualified applicants for the purser position, the Company did not canvass the stewardess ranks, nor consider applications from females who were applying for stewardess positions. Rather, the Company resorted to advertising and lowering of standards to recruit pursers from outside.

27. When the Company anticipated purser vacancies, its practice was to hire men off the street, put them through its five-week cabin attendant training program, and *then* post notices of purser vacancies. These men were "assured of a job." If the Company awarded a purser vacancy to a stewardess who bid for it, the result would be that the Company had a purser excess, and as future needs arose, no vacancies would have to be posted.

28. Late in the Summer of 1967, without posting notices of the existence of any purser vacancies, the Company hired five male applicants as pursers and entered them

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into its training program. These males were hired to fill purser vacancies in October 1967. Laffey learned of the hiring of the men and complained to Homer Kinney, the Company's Director of Labor Relations, that the hiring of these men without posting notices of the purser vacancies violated the 1967 agreement. Kinney acknowledged that Laffey was correct, and a notice was posted on October 20 advising that five purser vacancies at the Seattle base were available for bid, to be filled on or about November 10, 1967. Meanwhile, the five males had completed their training and were assigned to purser positions on October 4, 1967.

29. Two stewardesses bid for these vacancies; Laffey, who had nine years seniority as a stewardess, and Shirley Linburgh, who had 15 years seniority. Linburgh's bid was received a few hours past the bid deadline, and she was advised that consequently her bid would not be considered, despite the fact that five vacancies were posted and only two cabin attendants bid for such vacancies.

30. Although the vacancy for which Laffey bid was to be filled on approximately November 10, 1967, that date passed without Laffey learning anything in response to her bid. She inquired of R. R. McPherren, her supervisor. McPherren wrote to Kinney on November 21, inquiring about the delay in processing Laffey's bid; Kinney responded that the delay was because the Company was obtaining new tests to be administered to purser applicants. While Laffey was waiting, the Company hired two more men as pursers, without giving them the tests which (because not yet developed) were the stated reason for making Laffey wait. (Nor were the five male pursers hired in October, 1967, given these tests).

31. Laffey received no response to her bid until April 1968, despite repeated demands by her that the bid be acted upon. This was an unusually long delay for filling a posted purser vacancy. On or about April 10, 1968, Laffey phoned Kinney to remind him that it was now nearly 5 months since the vacancy had been scheduled to be filled. Not until after this inquiry did the Company begin to seek new tests to be administered to purser applicants. Kinney instructed Virgil Fencl, the Company's Director of Employment, to obtain such a test. Fencl then contacted Doctor Lowell Hellervik, a testing specialist who provided regular consulting services to the Company, and requested a short test which could be used to identify supervisory potential in purser candidates. Shortly thereafter, Hellervik recommended to Fencl that the Company use a test called the "Self-Description Inventory," and submitted the test to Fencl on April 17, 1968. In May, Laffey was finally tested and interviewed. In June, she was notified that her bid for the purser vacancy was granted. She became the first and only female purser in NWA.

32. The Company initially advised Laffey that her seniority date on the purser seniority list would be the date of her actual assignment to the purser job in June, 1968. Laffey protested that this would place her below the male pursers who had been hired in October 1967, without the posting of notices as required by the 1967 agreement, as well as below the male pursers who had been hired in December 1967 while her bid was pending. Finally, the Company assigned her a purser seniority date of October 4, 1967.

33. For pay purposes, the Company placed Laffey on the bottom step of the purser salary scale, and began paying her a smaller salary than she had received as a senior stew-

ardess. Laffey filed a grievance protesting that this violated Section 3(i) of the 1967 agreement, which provided: "No reduction in pay shall be suffered by an employee by virtue of his accepting a purser assignment." The Company ultimately acquiesced and raised Laffey's salary to that which she had been receiving as a stewardess. Thereafter, the Company treated Laffey as moving one step up the purser scale for each six months she served as a purser. It was not until Laffey reached the fifth step of the purser salary scale that she began to receive a higher salary than she had received as a stewardess; until that point, she continued to receive her stewardess salary pursuant to the "no reduction in pay" provision.

34. Because Laffey was not given credit for her years as a stewardess when she was placed on the purser seniority list, she occupied a relatively junior position on that list, and was forced to bid the least desirable schedules, frequently having to fly as a reserve purser.

35. In July, 1970, the Brotherhood of Airline Clerks (BRAC), which represents certain of the ground personnel employed by the Company, struck. The strike lasted until mid-December, 1970. The Company flew only a portion of its flights during the strike. At the conclusion of the strike, the Company decided to remove pursers from certain flights on which it had previously used them. As a result, a number of pursers were demoted to FSAs, and Laffey was demoted to stewardess. As purser vacancies have arisen since December, 1970, they have been filled by the demoted pursers in the order of their purser seniority. Because reductions in force are governed by purser seniority, Laffey was one of those who lacked sufficient seniority to remain as a purser.

From that date until the present, she has been reduced to her former status as a stewardess and has been paid as such, while men hired in 1965 and 1966 have continued to fly as pursers. Had she been assigned a purser seniority date which included her seniority as a stewardess (in the same manner that FSAs who progressed to purser had their seniority as an FSA included in their years of service as a purser), she would have had sufficient seniority to remain as a purser at the time of the reduction in force and at all times thereafter to the present date.

36. Other stewardesses who submitted bids for purser vacancies were refused.

(a) In late 1967, Alice Bernhard, a stewardess with 8½ years of seniority, submitted a timely bid for a purser vacancy to be filled in late December. Bernhard received a letter from McPherren advising that her "qualifications at this time are not sufficient" to be a purser. No tests were administered to Bernhard, nor was she interviewed, prior to the Company's rejection of her bid. She did not file a grievance concerning the denial of the bid.

(b) In October, 1969, stewardess Carolyn A. Blair (now Carolyn Ingold) submitted a timely bid for a purser vacancy. On November 5, 1969, McPherren wrote to Blair that her bid was rejected because her qualifications were insufficient to be a purser. The Company neither interviewed nor tested Blair prior to the sending of this letter. Blair's pre-employment interviews and tests, and her cabin attendant evaluations, reflected that she was mature, unusually intelligent, and a dedicated cabin attendant. She did not file a grievance concerning the denial of the bid.

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(c) In April, 1969, Janice P. Smith, a stewardess with five years' seniority, went to the Company's Cabin Service Office in Seattle, filled out an application for employment as a purser, addressed it to the Company's general headquarters in Minneapolis, and left it for delivery in the intra-company mail. She received no response to her application. In late 1969, Smith went to the Seattle office and asked McPherren what was happening with respect to her application. McPherren responded that he was not aware that she had made an application. Smith replied that she had, and asked if she could fill out another application in McPherren's presence, or file a letter of preference. McPherren replied that she could not, and that she would have to wait until a notice of purser vacancy was posted and bid at that time. Smith said that she would rather leave an application, as she had not seen notices in the past, and feared that she would miss them and thus not be able to bid when purser vacancies arose. McPherren told her that those not employed with the Company, or employed in non-cabin-attendant positions, could seek purser positions through such applications but that stewardesses had to wait until a posted vacancy appeared.

(d) On March 21, 1970, stewardess Beverly Emge submitted a timely bid for a purser vacancy at the Washington base. No other bids were submitted for the vacancy, and Emge was invited to Minneapolis (she was based in Washington, D.C.) to be interviewed on April 17, 1970, by James Robertson, the Company's Director of In-Flight Services. Robertson told Emge that if she took the vacancy she would be the junior purser and thus would have no choice in her bidding assignments, that she would

suffer a cut in pay, and that, as the junior purser, she would be subject to being involuntarily transferred to other bases. He told her that the Company was contemplating a reduction in the size of its Washington base, and an expansion of its Honolulu base, so that Emge would run a serious risk of being transferred to Honolulu if she accepted the bid. Emge did not wish to leave the Washington, D. C. area. Based upon Robertson's representations that her acceptance of the purser vacancy might result in her involuntary transfer to Honolulu, she was doubtful whether to take it. Robertson told her that she had to decide immediately, as there was a male cabin attendant at another base who was anxious for the vacancy. Emge said she would withdraw her bid, and Robertson had her sign a letter, which was already prepared and typed, withdrawing her bid.

1. Three days later, the Company posted a notice announcing yet another purser vacancy at the Washington base, to be filled on or about May 2, 1970. Upon seeing this posting, Emge had a change of mind and accordingly, on April 23, 1970, submitted a bid for this new purser vacancy at the Dulles base.

2. The notice had stated that bids had to be submitted no later than noon Pacific Daylight Time on May 1, 1970. By the close of business on April 30, Emge's was the only bid for this vacancy. Early in the morning of May 1, 1970, at or prior to 7 a.m. Honolulu time, Chalmers Hunter, a purser based in Honolulu, phoned In-Flight Supervisor Jack Gulett, who was staying at a Honolulu hotel, and indicated a desire to transfer to Washington, D.C. Gulett advised Hunter that there was a vacancy for which bids had to be sub-

mitted that very day. Hunter said that there was no way he could transmit a bid so that it would be received by the Company in Seattle by the 12 noon deadline (12 noon Seattle time is 9 a.m. Honolulu time). Gulett said that he would try to utilize the Company's teletype equipment for that purpose. Gulett phoned the Company's crew scheduling office in Honolulu and instructed an employee "to get the bid on the machine immediately." The teletype operator types the time of transmission on the message. Gulett told him that the bid "had to be dated before noon Pacific time to be valid." According to the Company's records, the bid was received in Seattle at 11:53 a.m. Pacific Daylight Time. Later that day, the Honolulu office received a reply teletype from Seattle announcing that Hunter was the successful bidder for the vacancy.

3. Emge's seniority date is September 29, 1961. Hunter's seniority date is November 16, 1969. On the ground that she had greater seniority, Emge filed a grievance protesting the award of the purser vacancy to Hunter. The Company, thru Robertson, construed the 1967 and subsequent agreements as according junior pursers priority over senior stewardesses if both bid for the same purser vacancy and accordingly, denied the bid.

37. From the time the purser classification was established in 1947 until June 15, 1967, NWA exclusively hired males for the purser position. The Company desired to confine the purser position to males for the following reasons:

(a) A belief that males could more adequately perform the supervision and conducting job of the purser.

(b) Oriental officials, passengers and cabin attendant were conditioned by custom and mores to deal with and accept leadership and direction of males rather than females.

(c) It was considered important to have male pursers on the transpacific flights to cope with rowdy seaman crews.

(d) Lifting of heavy cargo, food, galleys, baggage could best be performed by males.

(e) During the period from 1963-1970, NWA flew certain military charter flights out of Honolulu on which only males could be used pursuant to United States Government contract and specifications.

(f) An interest in having pursers once trained remain with the Company to avoid need for special purser training and turnover on international routes, the Company experience being that males were more career oriented and more likely to remain with the Company (turnover rate among NWA's female cabin attendants three times greater than male cabin attendants).

38. The Company sought to effect its desire to confine the purser position to males in the following ways:

1) Between May 1, 1965 and May 1, 1970, hiring 119 new pursers, only one of whom was a stewardess (Plaintiff, Laffey) and during same period hiring 2,244 new female cabin attendants. As of April 25, 1970, NWA employed 137 male cabin attendants, all as pursers, and 1,747 female cabin attendants, all but one as stewardesses.

2) Top Company personnel were explicit and candid

in expressing personal and Company preference for male pursers and discouraging stewardesses who applied.

3) Inordinate and unusual delay in processing the bid of Plaintiff, Laffey, the only female applicant to survive an immediate or perfunctory rejection.

4) Disqualification of stewardesses without interview or tests and despite their experience as cabin attendants.

5) Posting notices of pursers vacancies addressed expressly to male employees ("to all purser and FSA's").

6) Failing to consider stewardess applicants for purser positions no matter how well qualified.

7) Hiring and training new pursers in anticipation of purser vacancies, then posting notice of vacancies and thus assuring jobs to new pursers rather than awarding vacancies to possible applicants from the stewardess ranks.

39. Qualifications and requirements for female cabin attendants have differed from male cabin attendants as follows:

1) Female cabin attendants, when hired, sign a form stating: "I understand that among the qualifications and requirements of a stewardesses' position are . . . weight in proportion to height, that failure to maintain such qualifications . . . will be cause for termination of my employment." Male cabin attendants are not required to sign such a form when hired. When hired, female cabin attendants are given a specific weight at which they must report for training; if they arrive at training more than one pound over this prescribed weight, they may be dismissed from class. No such requirement is imposed upon male cabin attendants hired.

2) The Company's Cabin Service Manual contains a table of prescribed weights to which female cabin attendants must adhere. Prior to the trial in this case no such weight chart existed for male cabin attendants. All female cabin attendants are weighed on a regular basis at least two times per year, and are also weighed whenever they appear overweight. No such periodic weighing of male cabin attendants takes place.

3) Female cabin attendants who exceed the weight prescribed in the cabin service manual by more than five pounds are advised that they will be grounded and ultimately terminated, unless they return to their prescribed weight within a specific period of time, if they do not return to their prescribed weight they are grounded (i.e. suspended from employment and not permitted to fly) until they have returned to their prescribed weight. Substantial numbers of female cabin attendants have been grounded for exceeding their prescribed weight, and in some instances even terminated.

4) The Company does not regularly monitor the weight of its male cabin attendants, and they have continued to fly even if substantially overweight, without being ordered to lose weight, without being placed on weight check, and without being threatened with grounding or termination. Only rarely have overweight male cabin attendants been placed on weight check (since the effective date of the Civil Rights Act, only three male cabin attendants have been placed on weight check, and of these, two were placed on weight check after the filing of this lawsuit); and only one male cabin attendant has been grounded, for a period of one week, for failure to

maintain an appropriate weight. In each of these rare instances the male attendants involved were very substantially overweight, and were permitted to continue flying even though they did not reduce their weight anywhere near that suggested (or even gained additional weight).

5) The Company has always required female cabin attendants to share hotel rooms on lay-overs away from their home base.

6) Since at least 1964, male cabin attendants have been provided with single rooms on lay-overs. This has been so, for the most part, even where two or more male cabin attendants have been on the same flight. In April 1971, the Company issued a bulletin purporting to remind male cabin attendants "of a Company policy which has existed for many years that when there are two male cabin attendants on a crew, they will share a room at lay-over points." However, the Company rarely, if ever, enforced such a policy, in that even when two male cabin attendants were on the same flight, they obtained single rooms which the Company paid for without objection to the male cabin attendants. On most interport flights (flights beyond Tokyo) there is one male American purser and one male Asian flight service attendant, but they have not been required at any time to share rooms.

7) The Company maintains a rule forbidding all female cabin attendants from wearing eyeglasses, but does not maintain such a rule with respect to male cabin attendants hired prior to September, 1971.

8) Female cabin attendants are subject to discipline, including possible discharge, for violating the Company's rule forbidding them to wear eyeglasses.

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9) Female cabin attendants are permitted only to wear contact lenses, which are substantially more expensive than eyeglasses with lenses of comparable quality.

10) At all times, female cabin attendants wishing to carry luggage aboard the plane have been required to purchase luggage strictly prescribed as to brand, size and color.

11) At no time have male cabin attendants been restricted in their choice of luggage, other than that it be "in good condition."

12) The 1970 collective bargaining agreement provided that male cabin attendants (pursers and FSAs) were to receive a uniform cleaning allowance of $13.00 per calendar quarter. Female cabin attendants did not receive this allowance.

13) Prior to June 21, 1972, the Cabin Service Manual provided that the "chain of command" aboard the aircraft, after the cockpit crew, was purser, then other male cabin attendant if one assigned, and then stewardesses in seniority order. On June 21, 1972, the Manual was changed to provide an order of purser, and then stewardesses or flight service attendants in seniority order.

14) Prior to September 1, 1971, the Company did not hire females as cabin attendants if they were taller than 5'9". The maximum height for females was raised to 6'0" on September 1, 1971. The maximum height for male cabin attendants was 6'0" at the time when the maximum for females was 5'9".

15) From the beginning of its operation until June 15, 1967, the Company followed a policy of terminating

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all female cabin attendants when they married. It never had such a rule with respect to male cabin attendants. Despite a series of EEOC findings of probable cause, beginning in December, 1965, that this policy violated Title VII, the Company resisted changing its marriage rule until the conclusion of collective bargaining negotiations resulting in the June 15, 1967 agreement. At that time it agreed to abandon the policy, and to reinstate only those stewardesses terminated since the effective date of Title VII, and then only if they applied for reinstatement within three weeks of the ratification of the agreement and if they waived all claims to back pay.

16) From the beginning of its operations until 1971, the Company had a policy forbidding the hiring of married females as cabin attendants. It has never had such a rule with respect to hiring male cabin attendants. Despite an EEOC finding of probable cause, in June 1969, that this policy violated Title VII (and despite earlier EEOC findings of probable cause concerning the policy of terminating female cabin attendants when they married), the Company persisted in following this non-hire policy until February, 1971, when it entered into a conciliation agreement with the Minnesota Department of Human Rights to abandon the policy.

17) From 1956 until the June 15, 1967 agreement, the Company had a rule forbidding female cabin attendants from flying following their 32nd birthday. It never had such a rule with respect to male cabin attendants. In September 1968, the EEOC, in response to a charge filed in August, 1966, found probable cause to believe that the age 32 policy was a violation of Title VII. Between late

March, 1970, and mid-June, 1970, at least 32 stewardesses filed charges with the EEOC alleging that the Company was discriminating on the basis of sex in its treatment of female cabin attendants. On July 14, 1970, the EEOC sent "Notice of Right to Sue" to at least six of these charging parties, all of whom are named plaintiffs in this action.

40. The diverse types of flight itineraries which the Company operates, or has operated in the past, are described below:

(a) *Pure domestic commercial flights* are those regularly scheduled commercial flights which both begin and end in the United States, and do not continue on to the Orient.

(b) *Domestic segments of international commercial flights.* Since 1959, most of the Company's transpacific flights have originated in one U.S. city (generally on the East Coast), fly to the West Coast of the United States, and then to on to the Orient. Such flights return from the Orient to the West Coast, and then go on to the East Coast. Those portions of such flights which both begin and end in the United States are referred to as "domestic segments of international flights" or "domestic segments."

(c) *Transpacific commercial flights.* The Company has flown regularly scheduled transpacific commercial flights between Anchorage and Tokyo since 1947, between Seattle and Tokyo since the early 1950s, and between Honolulu and Tokyo since August, 1969.

(d) *Commercial interport flights* are those regularly scheduled flights between Tokyo and the other Asian

cities serviced by the Company (presently Osaka, Okinawa, Seoul, Taipei, Manila and Hong Kong).

(e) *Military Air Charter (MAC) flights.* For many years the Company has contracted with the U. S. Government to provide regularly scheduled military air charter flights between various cities and/or military bases. Such service has included pure domestic, domestic segment, transpacific, and interport flights. In addition from 1963 through June 1970 the Company provided MAC flights between Hawaii and several military bases in the Coral Islands in the Pacific.

(f) *Commercial charter flights.* In addition to its regularly scheduled flights, the Company frequently enters into agreements to provide commercial charter flights. Such service has included pure domestic, domestic segment, transpacific, and interport flights.

41. The diverse flight itineraries described above have been manned by cabin attendants in various manners. Some of the Company's flights are scheduled to be flown exclusively by stewardesses and FSAs. Some are scheduled to be flown by one purser and the rest stewardesses and FSAs. Some have been scheduled to be flown by more than one purser. Purser utilization on these various types of flights is described below:

(a) In general, *pure domestic* commercial flights have always been scheduled to be flown exclusively by stewardesses and FSAs. The major exceptions where pursers have been used are listed below:

(1) Between 1949 and 1954, the Company regularly scheduled a purser on each of its flights between

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Seattle and Honolulu, and in recent years pursers intermittently have been scheduled on such flights; also, throughout 1970 pursers were regularly scheduled on certain pure domestic flights between Seattle and Honolulu.

(2) Throughout 1970, in an effort to enhance its service and competitive position the Company regularly scheduled a purser on its flights from Honolulu to Chicago and New York and return.

(3) At various times, in order to "position" pursers or to have pursers work while "dead heading," the Company regularly has scheduled pursers on some or all of its flights between Seattle and Anchorage.

(4) In emergency situations in which there is a shortage of available cabin attendants, due to illness, strikes, special holiday or weekend plans, or other factors, the Company has utilized reserve pursers, pursers on "time available," and pursers volunteering for overtime assignments on pure domestic flights which normally do not utilize pursers.

(b) From 1959 through 1970, the Company regularly scheduled one purser to each *domestic segment* of an international flight. The itineraries flown by pursers on domestic segments, and the periods during which pursers were regularly scheduled on such itineraries, were as follows:

(1) June, 1959-July, 1970: from Anchorage to either New York or Washington, D.C. (with intermediate stops) and return.

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(2) 1960-December, 1970: Seattle to New York (with intermediate stops), and return.

(3) Approximately 1968 or 1969-mid 1970: Seattle to Philadelphia (with intermediate stops), and return.

(4) August 1, 1969-December, 1970: San Francisco and Los Angeles to Honolulu and return.

(c) One purser normally has been scheduled at all times to fly on each *transpacific* commercial flight.

(d) From 1947 to 1952, the Company's *interport* flights were manned with one American purser, as well as one American stewardess. From 1952 to 1957 no American cabin attendants flew on interport flights; they were manned exclusively by Asian cabin attendants based in Tokyo. Since 1957, one American purser normally has been scheduled on each interport flight, with the rest of the crew consisting of Asian cabin attendants.

(e) The Company always has scheduled at least one purser on each *MAC* flight, whether it be pure domestic, a domestic segment, transpacific or interport. Purser utilization on the Coral Island MAC flights (and the pure domestic MAC flights between Hawaii and California) is described in (f) below.

(f) From the inception of the *Coral Island MAC* flights (and the pure domestic MAC flights between Hawaii and California) in 1963 until October, 1969, at least one, and often two pursers were assigned to each flight. From October, 1969 until June, 1970 (when the Company lost its contract for such flights), the entire 3 to 5 member cabin attendant crews on such flights con-

sisted solely of pursers. From 1963 until June 1970, a small group of pursers and FSA's were based in Honolulu to fly the Coral Islands military flights. In addition, for reasons of both economics and experience, these individuals were used to fly on the military charter flights between Hawaii and California. The very small size of the Honolulu base presented special scheduling problems, even on a regular basis but particularly in emergency situations, and thus more than one purser may have worked on given flights. This was especially true from October 1969 until June 1970, as a result of the fact that all FSA's at the Honolulu base were upgraded to purser for reasons of economics, expedience and relations with NWA's military contract customers. However, paying more than one individual as a purser, pursuant to its established policy [see Finding 34], still was less costly than increasing the number of cabin attendants based at Honolulu with resulting underutilization of their time and the payment of special monthly station allowances.

(g) A purser normally has been scheduled on all transpacific and interport commercial charter flights, on all domestic segments of international charter flights (until December, 1970), and, occasionally, on pure domestic charter flights. NWA does so only if it receives a specific request from the charter group for a purser or supervisory individual, or on those special occasions when (1) pursers are the only ones available to take the flights, or (2) the positioning of pursers for other flights makes it both economic and expedient to have them fly the domestic charters.

42. The Company mans its international flights such

that a particular cabin attendant crew (including the purser if one is aboard) flies only one segment of a flight. Thus, one crew will fly the domestic segment, another the transpacific leg, and a third the interport portion. NWA has maintained cabin attendant bases at the following cities during the designated periods: Seattle (at least 1947 to date); Minneapolis-St. Paul (at least 1947 to date); Honolulu (1963 to September, 1971); and Washington, D.C. (approximately 1960 to September, 1971). Pursers have been (or were) based in Seattle from 1947 to date, in Minneapolis-St.Paul from 1947 to 1962, in Washington, D.C. from June 1969 to July, 1970, and in Honolulu from 1963 to September, 1971. Stewardesses have been (or were) based in Seattle and Minneapolis-St. Paul from at least 1947 to date, and in Washington, D.C. during the entire period that base was open. NWA also maintains cabin attendants bases in the Orient, at which are assigned all of the Asian cabin attendants who fly on the interport flights.

43. Each month, the Company constructs cabin attendant schedules, representing the itinerary to be flown by a cabin attendant during that month. Separate schedules are constructed for each cabin attendant base. At each base, separate schedules are constructed for pursers and for non-pursers (i.e., stewardesses and FSAs). The employees in each classification bid for schedules at their base in order of their seniority. Generally, purser schedules are (or have been) constructed such that all of an individual's flights in a given month will be of the same type, i.e., all MAC, all domestic segments, all pure domestic, all transpacific, or all interport (plus transpacific).

44. The Company sought and obtained a provision in

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the 1967 collective bargaining agreement, entitling it to assign "foreign national" (Asian) stewardesses to the Seattle base irrespective of seniority, and to assign one foreign national stewardess to each transpacific flight irrespective of seniority. (The 1970 agreement changed the phrase "foreign national stewardess" to "stewardess proficient in the Japanese, Korean or Chinese language.") The Company desired to have foreign nationals on its transpacific flights: (a) to have a foreign language proficiency on the flight, (b) to improve the Company's relations with the Asian Governments with which it has to deal, and (c) to attract Asian passengers. Separate monthly flights schedules are constructed for foreign national stewardesses, designed to place one foreign national on each transpacific flight. Foreign nationals are permitted to bid and fly only on these separate schedules. Foreign national stewardesses, who are covered by the collective bargaining agreement, receive the same salaries as other stewardesses of equal seniority, despite their language proficiency and the restricted schedules which they are permitted to bid.

45. The Company and ALSSA engaged in negotiations in 1969 and 1970 which culminated in the March 1, 1970, collective bargaining agreement. In these negotiations, ALSSA proposed that stewardesses be allowed to progress to purser vacancies in seniority order; that stewardesses who become pursers be credited with their full cabin attendant seniority; and that stewardesses who become pursers be slotted into the purser pay scale on the basis of their total cabin attendant seniority. The Company refused to agree to any of ALSSA's proposals. Its chief negotiator stated that the Company "prefers males and intends to have them" and that the Company "wants men because of their leadership

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ability." The highest ranking female employed by the Company in any capacity is a reservations supervisor. There are 200 to 300 men employed at levels above this highest ranking female.

46. On most of the Company's commercial flights, service is offered in two categories: first class and tourist class. The first class and tourist class capacities of the various planes presently used by the Company are as follows:

Plane	First Class Passengers	Tourist Class Passengers	Total Passengers
727-100	24	69	93
727-200	26	96	122
720B	16	93	109
707-320B	22	118	140
707-320C	22	120	142
747	58	304	362

47. The essential differences in service provided to the passengers in first class and tourist class are as follows:

(a) The seats and the aisles in the first class section are larger.

(b) A better quality of food service, served somewhat more elaborately, is provided in the first class section.

(c) Liquor normally is served free in the first class section, while passengers in the tourist section must purchase liquor.

(d) The number of passengers per cabin attendant is higher in the tourist section then in the first class section.

48. FAA regulations require that the various planes

used by the Company carry at least the following number of cabin attendants irrespective of passenger loads:

727-100	2
747	8
All others	3

The Company's present policy is to schedule each flight with the minimum of cabin attendants permitted, and to add additional attendants only if there are exceptionally heavy passenger loads. However, at least one additional cabin attendant is always scheduled on interport flights, so that there are more cabin attendants on such flights than on other flights with the same passenger load. The same number of cabin attendants (pursers, stewardesses and FSAs) is assigned to particular aircraft with particular passenger loads, whether or not a purser is one of the attendants, and regardless of the type of flight, i.e., pure domestic, domestic segment, or transpacific (except interport).

49. In general the passenger loads in first class are smaller relative to capacity than those in tourist class, and generally, the commercial flights on which pursers regularly are scheduled have smaller passenger loads relative to capacity than the flights on which pursers are not scheduled. On non-747 aircraft, generally one cabin attendant works in first class and two in the tourist cabin. On the 747, generally two or three attendants work in first class, with five or six in tourist.

50. The relative "work pace" or "work load" of pursers and cabin attendants depends upon a number of variables, including the position being occupied by the individual in the cabin, the type of equipment, the length of the flight, the

number of passengers and the number and allocation of the cabin attendants. The smaller passenger load per cabin attendant in the first class section (where the purser works) normally results in a more leisurely work pace than in the tourist section. The workpace and workload on cabin attendants is normally greater on "short hop" schedules than on longer segment flights.

51. Virtually all duties assigned to cabin attendants are performed by all cabin attendants, regardless of classification. In general, cabin attendants are responsible for making pre-departure checks of the cabin; greeting and seating passengers; securing the cabin for take-off; providing food and beverage service, tending to passenger needs; briefing passengers on emergency procedures; guiding and assisting passengers in the event of emergencies; completing required documentation; answering passenger questions; keeping the cabin in a neat and orderly condition, before, during, and after the flight; insuring that passengers conform to required regulations; and deplaning passengers.

52. One of the most important (if not the most important) responsibilities of all cabin attendants is insuring, to the greatest extent possible, the safety of passengers in the event of an emergency. All cabin attendants must have detailed knowledge of first aid techniques and be able to deal on an instantaneous basis with a myriad of medical emergencies in flight. All cabin attendants are required to possess a thorough knowledge of emergency procedures and equipment on each type of aircraft the Company operates. To this end (a) a great portion of a cabin attendant's initial pre-hire training is devoted to emergency procedures and equipment; (b) every year each cabin attendant is required to complete an Emergency Recurrent Training course and

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pass examinations related thereto (or be grounded); (c) each attendant must take a training course in aircraft familiarization each time a new type plane is put into use; (d) predeparture emergency briefings are conducted by the Senior Cabin Attendant prior to *every* flight; (e) each attendant is required to have thorough knowledge of the voluminous and detailed emergency instructions contained in the Cabin Service Manual; and (f) cabin attendants periodically are evaluated by means of unannounced check rides by supervisors, which include testing on emergency procedures and equipment.

53. Aside from doing everything possible to insure passenger safety in the event of an emergency, the most important aspect of the job of all cabin attendants, whatever their classification, is acquiring and maintaining the goodwill of the Company's passengers. The Company is in the business of, and derives its revenues and profits from, transporting persons from one place to another. The success of the Company depends upon the goodwill of the passengers, the confidence they have in its ability to perform the services offered and the respect they have toward the Company. All cabin attendants play an extremely important part in dealing with the public since they are in contact with the passengers for a prolonged period of time, indeed, for far greater periods of time than any other Company representatives. Thus, no matter which particular duty a cabin attendant is performing at a particular time, as it involves passenger contact the cabin attendant must exercise a high degree of poise, tact, friendliness, good judgment and adaptability.

54. The type and quality of food service offered by the Company varies greatly between its flights, and between

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first and tourist class sections. The Company offers the following types of food service:

(a) Pre-set casserole service, which is boarded onto the aircraft in pre-set fashion, and requires the cabin attendants to heat the entree item in an oven aboard the aircraft, place it upon the pre-set tray, and deliver the entire meal at one time on a tray to the passenger.

(b) Out-of-galley china course service in which the food is loaded aboard the aircraft in bulk, heated by the cabin attendants in bulk, and is dished onto china dinnerware by the cabin attendants and carried from the galley to the passenger. The meal is served in various courses.

(c) Cart service, which is virtually identical to out-of-galley china course service, except that each course is served to the passenger from a serving cart located in the aisle in front of the passenger. On some flights, a combination of the above types of food service is offered.

55. The pre-set casserole service is generaly utilized in tourist class on all of the Company's scheduled commercial flights. This service with meals of a higher quality is regularly used in first class. All types of services variously are (or have been) utilized in first class, the domain of the senior cabin attendant—purser or stewardess. The Company's cabin service manual and periodic service bulletins issued to all cabin attendants carefully describe the preparation and serving procedures for each type of meal service, and the duties of the various cabin attendants with respect to that service.

56. Food and beverage service is one of the competitive components of the Company's passenger service. The Com-

pany meets its stiffest competition in this service area on the international routes on which the pursers are present. During the period 1965-1970, in an effort to upgrade the food and beverage service on these flights, the Company hired pursers with food and beverage skills and experience. It also gave special training to pursers and interested cabin attendants in an internationally flavored cart service cuisine. The purser was principally responsible for the proper utilization of this service. Normally the purser dished the food and mixed the drinks while stewardesses served and took orders. Currently, this service is utilized in a more limited fashion on the 747s as an extension of the galley. On flights between Anchorage and Tokyo, which utilize 320 equipment, the full cart service is still used.

57. Pursers perform no duties with respect to food service which are not also performed by stewardesses, either on the same flight or on other flights. The duties assigned to the Senior Cabin Attendant in the preparation and service of cart service are identical, whether such attendant is a purser or a stewardess. The duties of the Senior Cabin Attendant (purser or stewardess) in the preparation and service of first class meals where cart service is not utilized are identical to those of the other first class attendants (where there are such). With respect to food service on MAC and commercial charter flights (and on other flights with no first class service at all), the duties of the Senior Cabin Attendant are the same as all other cabin attendants on such flights.

58. All cabin service attendants variously have certain responsibilities with respect to documentation. Both pursers and stewardesses have certain major responsibilities with respect to liquor service and documentation pertaining

thereto. On all regularly scheduled commercial flights, liquor is provided without charge in first class and is sold to passengers in tourist class. No liquor is served on MAC flights. Thus pursers are not responsible for liquor sales and receipts. Cabin service attendants who do sell liquor are responsible for collecting the appropriate prices in whatever currency tendered and when necessary convert Asian currencies into U.S. equivalents. They are required to complete Company records with respect to the beginning and ending inventories of liquor "kits" boarded and a sales and deposit record (Form AC-237) and a beverage usage report form (Form FS-59). In first class, only a beverage use form is required (Form FS-7 or FS-11). On flights carrying tax free liquor, certain United States custom inventory forms must be completed in both first class and tourist. Cabin attendants are subject to discipline for improper completion of any of these forms and the Company is subject to a fine for the improper completion of the United States Customs liquor inventory forms.

59. There are certain other Company documents and forms which all cabin attendants are responsible for at various times:

(a) On all flights, the senior cabin attendant and the senior in tourist must complete the In-Flight-Service report (Form FS-23) on which are recorded the names of the cabin service crew, passenger count, number of beverages sold and meals boarded, departure and arrival times, and comments regarding services or special or unusual events during flight.

(b) On all flights, the senior cabin attendant and the senior in tourist must complete the log book in which are recorded cabin items requiring servicing or repair.

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(c) On all non-747 flights, the senior cabin attendant and the senior in tourist must prepare seating charts. Seating charts are not required on international 747 flights but are required in first class on domestic 747 flights.

(d) On all flights, where circumstances require, completion of forms pertaining to in-flight movies, ticket upgrading, meal vouchers, accident reports and lost and found articles. Cabin attendants are subject to discipline for improper completion of these forms.

60. In addition to the Company forms, and the U. S. Customs forms related to liquor, various governments require that certain documentation be handled by the airline. Cabin attendants (generally the senior cabin attendant) have certain responsibilities with respect to such documentation, which are described precisely in the Cabin Service Manual and cabin service bulletins. There are certain government documentation duties performed on both purser and non-purser flights.

1) On all flights from mainland U.S. to Hawaii the Senior Cabin Attendant, almost always a stewardess, is responsible for:

(a) Passing out and collecting an agricultural declaration form (Form A), upon which each passenger is to list any plants or live animals which he is bringing into Hawaii. In passing out the form, the Senior Cabin Attendant tells the passengers what the form is about, and explains how they will know whether or not they are required to fill it out.

(b) Spraying the cabin with an insecticide prior to

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arrival and recording such on a Certificate of Disinsectization. (From October 1969 to December 1970, pursers were regularly assigned to some, but not all, of such flights. Between 1954 and 1969, and since 1971, only stewardesses (and FSAs) have been regularly scheduled on these flights.)

2) On flights from the U.S. to Winnipeg, stewardesses are responsible for passing out Canadian customs and immigrations forms to passengers, seeing that the appropriate passengers complete them in flight, and answering passenger questions about them. On flights from Winnipeg to the U.S., stewardesses are responsible for passing out U.S. customs forms (Form 6059-B) to passengers, seeing that they are completed in flight and answering passenger questions about them.

3) The U.S. Immigration Service has had an agreement with the Company since 1967 which permits the Company to accept for passage aliens transiting the U.S. without a visa ("TRWOV"). The Company assumes the responsibility of the alien's continuous transit through, and departure from the U.S., and severe penalties will be levied if a TRWOV passenger should deplane and disappear within the U.S. TRWOV passengers are carried on flights both with and without a purser. Such passengers are placed in the custody of the Senior Cabin Attendant, who must assume direct personal responsibility to assure safe delivery and transfer of TRWOV passengers. The Senior Cabin Attendant maintains custody of the TRWOV passenger's travel documents during the flight. Failure to carry out these responsibilities subjects the cabin attendant to discipline.

4) On all international flights, all cabin attendants

are required to complete properly their own customs forms, and also are required to carry a valid passport. Failure to properly comply with these responsibilities subjects the attendant to discipline and can result in fines of the attendant and the Company.

61. The various governments at all of the international ports served by the Company impose certain policies, procedures and practices with respect to customs, immigration and quarantine (CIQ) requirements. As at the inception of the purser classification in 1947, the purser today is responsible for managing the international CIQ documentation requirements for passengers, crew and cargo. The various governmental CIQ documentation requirements vary and change from port to port, so that pursers are responsible for knowing and complying with these different and changing requirements at United States ports and at each of the various foreign ports, including Tokyo, Osaka, Seoul, Okinawa, Taipei, Hong Kong and Manila. The various international CIQ documents and the detailed procedures with respect to each are subject to frequent revision, sometimes with little or no advance warning. Pursers are required to remain constantly abreast of these changes and to implement them, on many occasions even prior to receiving official instructions or directions from NWA. In addition, there are separate documents required on NWA's military contract flights, which requirements vary with the location of the base. In general, these CIQ duties fall into four categories:

(a) *Transporting a pouch*—receiving and checking the contents of a pouch containing various government documentation from a Company transportation agent

(ground personnel) prior to departure and delivering it to another Company transportation agent upon arrival.

(b) *Assembling "manifest books"*—these generally contain copies of the General Declaration, cargo manifests and (on some interport and MAC flights) a passenger manifest. Cargo and passenger manifests (which constitute listings of cargo and passengers aboard the flight, respectively) are filled out by Company transportation agents, placed in folders by place of destination and delivered to the purser in the pouch prior to departure. The purser makes no entries on the manifests. The required number of manifest books (specified in the Cabin Service Manual) are prepared by sorting copies of the cargo manifests into an order specified in the Manual and stapling the bundle together with the General Declaration (and, if there is one, the passenger manifest) to form a "book." On MAC flights there are rarely any cargo manifests. The books are turned over to Company transportation agents upon arrival, who in turn distribute them to government personnel.

(c) *Passing out various customs, immigrations and/or quarantine forms*—these are forms which passengers are required to fill out prior to landing. The required forms for each port are placed into the pouch by Company transportation agents prior to departure, segregated for each port. The purser (and occasionally other cabin attendants) passes the forms out to the passengers, who complete and retain them to turn over to government officials after arrival. While the passenger immigration forms vary slightly from country to country, the basic information called for by the forms is essentially the same: name of passenger, address, citizenship, passport number,

and address while in country. Likewise, while the passenger customs forms vary slightly from country to country, the basic information called for—goods being brought into the country which were purchased in other countries—remains the same. The forms are printed in both English and the applicable Asian language, and most are self-explanatory and/or contain written instructions on their completion. Pursers (as well as other cabin attendants) answer passenger questions regarding such forms to the extent that they know the answers. Neither pursers nor stewardesses are responsible for knowing the answers to questions unless the information necessary to answer is contained in the Cabin Service Manual. Stewardesses know the answers to most questions. Pursers have no responsibility for completing passengers forms. Procedures with respect to passing out the passenger forms are detailed specifically in the Manual.

(d) *Making entries on certain documents*—pursers are responsible for making entries on only two government documents (other than the U.S. Customs liquor form)

(1) General Declaration (Form 7507): most of the form is completed by Company transportation agents. The purser checks crew passport numbers for accuracy, enters the number of passengers, recites that he has sprayed the plane, and lists any passengers whom the attendants believe to be ill. The General Declaration is required only on transpacific interport flights (commercial and MAC).

(2) Aircraft/Vessel Report (I-92): this is a U.S. immigration form used to record an aircraft's entry into

or exit from the U.S. It is used only on west-bound domestic segments of international flights and on Tokyo to U.S. transpacific flights. The purser enters the name and nationality of the airline (always the same, i.e., "Northwest USA"), flight number, date, ports of arrival and departure (always Seattle, Anchorage or Honolulu, and Tokyo), ports of destination, total number of passengers, and number of passengers bound for each port. It takes fifteen or twenty seconds for the purser to fill out the I-92. He turns it over to a Company transportation agent upon arrival.

62. The government documentary duties of pursers described in the paragraph above are not all required on all purser flights. Pursers perform the following documentary duties on the various types of flights on which they are (or were) used:

(a) On pure domestic flights: none.

(b) On the eastbound portion of domestic segments: transporting the pouch only.

(c) On the westbound portion of domestic segments: transporting the pouch, U.S. passenger immigrations form (I-94), and, during certain periods of time, Aircraft/Vessel Report (I-92).

(d) On U.S. to Tokyo flights: manifest books, passenger forms, and General Declaration.

(e) On Tokyo to U.S. flights: manifest books, passenger forms, during certain periods Aircraft/Vessel Report (I-92), and General Declaration.

(f) On interport flights: manifest books, passenger forms, and General Declaration.

63. Pursers are instructed and expected to carry out their international documentation responsibilities during times when there is little or no passenger service. While they are engaged in these tasks, the other cabin attendants provide any needed pasenger service and perform their other assigned tasks. All documentation duties are in addition to and not in place of regular passenger service duties for all cabin service personnel. Pursers are responsible and accountable for the international documentation. Pursers have not been disciplined to any greater extent or degree for failing to properly perform their tasks with respect to government documentation then have other cabin attendants been disciplined for failing to propertly perform their tasks with respect to Company and government documentation. Of all pursers employed at any time since 1965, only two have ever been suspended (one time each for a period of two days each) for improper performance with respect to government documentation, whereas stewardesses have received suspensions of greater duration for improper document work (including, for example, one 2-day and one 4-day suspension received by one stewardess, who was a witness at a trial, for failing to submit her own pay forms on time).

64. The documentary duties described which are (or were) assigned only to pursers involve no greater skill, effort or responsibility than does the documentary duties assigned to all cabin attendants. In addition the documentary duties of the purser does not make that job, in the aggregate, one requiring greater skill, effort or responsibility than the stewardess job.

65. The Company's Cabin Service Manual contains a "chain of command" during flight. The pilot is first in the chain of command, the co-pilot second, the third member of the cockpit crew is third and the "Senior Cabin Attendant" is fourth in the chain of command. If one purser is aboard, he is denominated the Senior Cabin Attendant irrespective of his relative length of service as compared to the other cabin attendants. If two or more pursers are aboard the flight, the most senior purser is the Senior Cabin Attendant. If no purser is aboard the flight, the most senior stewardess or FSA is the Senior Cabin Attendant. On interport flights, however, the male Asian FSA (who is assigned to most interport flights) is automatically the Senior in Tourist regardless of his seniority. It is rare that the captain or other members of the flight deck crew become involved in matters pertaining to cabin service or cabin attendants although all cabin attendants are subject to the authority and direction of the captain who is completely responsible for all crew members.

66. Among the cabin attendant crew, the Company's Cabin Service Manual provides that a purser shall always be considered the senior attendant and shall coordinate the activities of the other attendants and shall be held "responsible and accountable" for conduct of service on the entire flight. Absent a purser, the cabin attendant with the most seniority shall be the senior attendant also responsible for the coordination of cabin service activities on the entire flight but accountable only for the conduct of service in that section of the aircraft in which he or she works, the accountability in the remaining section or sections being placed on the senior attendant in that section. Duty assignments aboard the flight are made by the senior cabin attendant. Pursers are always assigned to the first class section.

67. Senior cabin attendants (whether purser or stewardess) engage in the following activities in discharging their "supervisory" responsibilities:

1) Monitoring and where necessary correcting work of other cabin attendants.

2) Determining time of meal service and movie showing.

3) Moving attendants from section to section to balance work loads.

4) Give pre-departure briefings on emergency equipment and procedures.

Stewardesses who serve as Senior Cabin Attendant are subject to discipline if they fail to carry out their "supervisory" responsibilities, and are held just as accountable as pursers who fail to carry out their "supervisory" responsibilities. Stewardesses who serve as Senior in Tourist are likewise subject to discipline if they fail to carry out their supervisory responsibilities. The Company does not maintain a merit system whereby either pursers or stewardesses who "supervise" well are paid more than those who do not supervise as well. All pursers are paid on the same scale, and all stewardesses on the same scale, regardless of how well or poorly they supervise.

68. The duties of each cabin attendant position are clearly defined in the Cabin Service Manual and cabin service bulletins. The Manual presents information, responsibilities, and instructions for cabin attendants in a clear and concise manner. It describes in detail cabin attendant duties, procedures and responsibilities. Each cabin attendant is required to be thoroughly familiar with all material covered

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in the Manual, and procedures in the Manual are expected to be followed explicitly. As cabin attendants acquire experience, they are better able to perform their duties with less need for coordination by the Senior Cabin Attendant. Relatively new attendants are less certain of their duties and how to perform them, and require closer watching and guidance than do more senior attendants. Normally, all of the stewardesses on flights on which pursers are assigned are relatively senior and experienced. The pursers' "supervisory" responsibilities therefore normally are less demanding than the "supervisory" responsibilities of stewardesses who serve as Senior Cabin Attendants on domestic flights with more junior stewardesses. Because the cabin attendants with the greatest seniority almost always elect to work in the first class cabin forcing the more junior and less experienced cabin attendant to work in the tourist class cabin, and because there are more cabin attendants in tourist class than in first class, the Senior in Tourist normally spends greater time and effort in coordinating the duties of other cabin attendants than does the Senior Cabin Attendant, on both purser and non-purser flights.

69. The Company hired, trained and promoted individuals in the purser classification with the expectation that they would exercise leadership and supervisory responsibilities immediately upon being placed as pursers. As automatic "senior cabin attendants" on all flights to which pursers were assigned, pursers are "responsible and accountable for the entire cabin service staff." Cabin Service Attendants other than pursers, who functioned on particular flights as the "senior cabin attendant" are "responsible for the entire flight" in the proper coordination of cabin service activities but "accountable" only for the conduct of service in the

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section of the aircraft to which assigned. In the performance of the duties of the purser and the non-purser senior cabin attendant, responsibility is synonymous with accountability. Only in the purser's formal relationship with the Company does his accountability differ from the non-purser senior cabin attendant and that difference is derived from status rather than as a function of the job. Cabin service attendants are employed to serve and protect Company passengers. The "supervisory" functions of senior cabin attendants—whether purser or stewardess—are less important than, and require no greater skill, effort or responsibility, than the other functions assigned to all cabin attendants.

70. Pursers are paid on a different and higher pay scale than other cabin service attendants. In each round of collective bargaining negotiations since at least the mid-1950's, the union proposed that stewardesses serving as Senior Cabin Attendant receive a supplement to their pay. In each instance, the Company has refused on the asserted ground that the longevity step provisions of the stewardess pay scale, which pay more senior stewardesses more than relatively junior stewardesses, together with the requirement that the most senior stewardess on a flight serve as Senior Cabin Attendant, provided added compensation for performing in that position.

71. When pursers were scheduled regularly on pure domestic flights, their duties were identical to those performed by the Senior Cabin Attendant on domestic flights without a purser. Pursers had no documentary duties on such flights which are not performed by stewardesses on other flights. When pursers were regularly assigned to domestic segments of international flights (1959 through December, 1970),

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their duties (other than the minor documentary responsibilities previously described) were identical to those performed by stewardesses serving as Senior Cabin Attendant on non-purser domestic flights. The only respect in which the duties of the purser as Senior Cabin Attendant on transpacific and interport flights differs from those of a stewardess as Senior Cabin Attendant on non-purser flights is that pursers perform certain government documentation responsibilities. These documentation duties do not make the purser job one requiring greater skill, effort or responsibility than the stewardess job. When the Company decided to remove pursers from the domestic segments of international flights in December 1970, it made no changes of any kind in the duties assigned to, and performed by, cabin attendants on the east-bound portions of such flights. The only change made with respect to the west-bound portion of such flights was that Company transportation agents, who had "always" had "the responsibility . . . to insure that each out-bound alien has a properly completed I-94" (U. S. Immigrations form) were now assigned the additional responsibility to collect the I-94s (which pursers had previously done in flight).

72. The work of all cabin attendants on MAC flights is less demanding than on other flights. There is no class service, no liquor is served, the food service is less elaborate than even in the tourist section of commercial flights, and the passengers are less demanding. The purser's government documentation duties on MAC flights, where there are any, are relatively minor. On the MAC flights flown out of Honolulu, on which there frequently was more than one purser assigned, and on which *all* cabin attendants were pursers from October 1969 through June 1970, the duties of all but the most senior purser (Senior Cabin Attendant) were iden-

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tical to the duties performed by stewardesses on other MAC flights. This is also true on the occasions when more than one purser is assigned to commercial flights.

73. A substantial percentage of the Company's overall utilization of pursers consisted of their assignment to pure domestic flights or to domestic segments of international flights. Many pursers flew such flights exclusively, for months or years at a time. In December, 1970, following the filing of this lawsuit and the BRAC strike, the Company removed pursers from pure domestic flights and domestic segments of international flights. Similarly, a substantial percentage of the Company's utilization of pursers has consisted of their assignment to MAC flights. Many pursers flew such flights exclusively, for months or years at a time.

74. Until January 1971, both purser and stewardess schedules normally were constructed so that the maximum number of consecutive nights away from home on a trip during the month ranged from zero to six nights. In and after January 1971, the Company redesigned its purser schedules so that many, but not all, pursers would be away from home on a trip during the month from eight to thirteen consecutive nights. Stewardess schedules continue to be constructed so that the normal maximum number of consecutive nights away from home on a trip during the month range from zero to six, although some schedules require more.

75. Until January, 1971, purser and stewardess "nights away" working conditions were not dissimilar at all. The eight to thirteen day trips which some pursers have flown since January, 1971, do not constitute substantially dissimilar working conditions from those of other cabin attendants. More consecutive days away from home also means more

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consecutive days at home during the month. The preferences of cabin attendants in this regard are highly subjective—some prefer one long trip a month, while others prefer several shorter trips; some find that remaining in the Orient for several consecutive days easier on their "biological clock" than repeated transpacific flights with frequent time zone changes. Because ground time is not counted toward flight time, purser schedules (encompassing longer flights) entail fewer actual hours of work, and fewer days away from home, than short-hop domestic stewardess schedules.

76. Although pursers have flown for many years to Manila, Okinawa, Taipei and Seoul on interport flights, the Company's schedules have never required, until 1972, that they layover in those cities. Pursers flying interport normally begin and end their day in Tokyo, flying round-trip flights to other Asian cities. From 1947 to the present date, American stewardesses regularly have had layovers in Tokyo. In 1966, the Company obtained authorization to fly to Hong Kong. At various times thereafter, the Company has constructed some purser interport schedules providing for one night layovers in Hong Kong. Those few pursers who have layovers in Hong Kong (or, recently, other Asian cities) do not have working conditions dissimilar from those of cabin attendants who do not layover in interport cities. (In addition, stewardesses flying on certain MAC flights have had layovers in interport cities.)

77. Interport flights are manned with an American purser and Asian stewardesses and FSAs (all of whom speak English). For years, substantial numbers of purser schedules were constructed so that they required no interport flying at all, and, therefore, the pursers filling such schedules

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did not have layovers in Hong Kong or fly with Asian cabin attendant crews. This included, *inter alia*, all pursers based in Washington, D.C. and in Honolulu. From 1952 to 1957 no American pursers at all were scheduled on interport flights. Flights flown by pursers with Asian cabin attendants pose no more difficult or different working conditions than flights without Asian attendants.

78. The job of purser and the job of stewardess require equal skill, effort and responsibility and are performed under similar working conditions.

79. The compensation of all cabin attendants is established through collective bargaining. There are two separate base salary scales—one for pursers and one for stewardesses (and FSAs). Each scale provides for longevity step increases. Pursers presently receive the top step in their sixth year as a purser, whereas stewardesses receive the top step in their ninth year. The base salary of both pursers and stewardesses is based upon 67 flight hours per month. Additional flight hours are compensated by an hourly incentive (overtime) rate (higher for pursers than for stewardesses). In addition, stewardesses who engage in "foreign flying—defined as all flights to or from any foreign country, Alaska, or Hawaii (but excluding Winnepeg, Canada)—receive a $1.00 per hour supplement for each hour flown on such flights.

80. Pursers' salaries are, and always have been approximately 30 to 55 percent higher than those of stewardesses of equal longevity engaged in domestic flying, and approximately 20 to 35 percent higher than stewardesses of equal longevity engaged solely in "foreign flying."

81. The Company maintains records which enable it to determine what flight a given cabin attendant has flown

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each day, the position held each day, and the time spent by that cabin attendant each day. These records enable the Company to pay cabin attendants different amounts for different portions of their monthly service. FSA's temporarily filling purser vacancies are paid the purser rate only while flying as pursers. Stewardesses flying international receive the "foreign flying" supplement only for the hours spent on the international flight. Permanently assigned pursers receive the purser rate and those of a given longevity the same salary whether or not they are filling the purser position on the flight and irrespective of the kind of flight, domestic, foreign or interport. Except for the "foreign flying supplement" all stewardesses of a given longevity receive the same salary, irrespective of the nature of the flights or the position occupied on the flight.

CONCLUSION OF LAW

1. The Court has jurisdiction over the parties and over the subject matter of this action, pursuant to the provisions of the Equal Pay Act [29 U.S.C. §206(d)] and Title VII of the Civil Rights Act of 1964 [42 U.S.C. §2000 (e)].

2. Northwest Airlines, Inc. has discriminated on the basis of sex in willful violation of the Equal Pay Act, 29 U.S.C. §206(d)(1), 29 U.S.C. §255(a), on jobs the performance of which require equal skill, effort and responsibility and which are performed under similar working conditions by:

(a) Paying female stewardesses lower salaries and pensions than male pursers.

(b) Providing less expensive and less desirable layover accommodations than male cabin attendants.

(c) Providing female stewardesses no cleaning allowance while providing a uniform cleaning allowance to male cabin attendants.

3. Northwest Airlines, Inc. has discriminated on the basis of sex in willful violation of the Equal Pay Act, 29 U.S.C. §206(d)(1), 29 U.S.C. §255(a), by paying Mary P. Laffey a lower salary as a purser than it pays to male pursers with equivalent length of cabin attendant service.

4. Northwest Airlines, Inc. has violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e)-2(a), (hereinafter "Title VII"), by paying female stewardesses lower salaries and pensions than male pursers for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

5. Northwest Airlines, Inc. has violated Title VII:

(a) By discriminating against females because of their sex in filling purser vacancies from July 2, 1965 to date.

(b) By providing from June 15, 1967 to date that stewardesses who became pursers do not get credit for their stewardess seniority on the purser seniority list, whereas male FSA's who have become pursers (both before and after June 15, 1967), get credit for their FSA seniority on the purser list.

(c) By providing that stewardesses who become pursers do not get credit for their stewardess seniority on the purser seniority list, thus perpetuating the effects of past discrimination from June 15, 1967 to date.

(d) By providing that stewardesses who become pursers are slotted at the bottom of the purser pay scale and thus receive lower salaries than male pursers with equal cabin attendant longevity, thus perpetuating the effects of past discrimination from June 15, 1967 to date.

(e) By changing its procedures and standards for selecting pursers, lengthening the probationary period, denying consideration of purser bids to stewardesses who have not flown with a purser for four years, according automatic preference to junior pursers over senior stewardesses in bidding for purser vacancies, discouraging and attempting to deter stewardesses from bidding on purser vacancies, failing to post notices of all purser vacancies at all cabin attendants bases, from June 15, 1967 to date.

(f) By demoting Mary P. Laffey from purser to stewardess and continuing her as a stewardess, by paying her a lower salary as a purser than it paid male pursers hired as cabin attendants subsequent to her, thus perpetuating the effects of past discrimination.

(g) By imposing a "chain of command" aboard its planes under which all male cabin attendants, irrespective of classification or length of service were superior to all female cabin attendants.

(h) By forbidding only female cabin attendants to wear eyeglasses, to be without cleaning allowances, to have free choice of luggage, to have single rooms on layovers, to be without weight prescriptions and weight monitoring and by imposing a shorter maximum height requirement for female cabin attendants.

6. Each of the above enumerated Title VII violations are continuing violation, and each continued during the 90 day period preceding the filing of charges with the Equal Employment Opportunities Commission and therefore, none is barred by the provisions of 42 U.S.C. §2000(e)-5(d).

JUDGMENT SHALL BE ENTERED ACCORDINGLY.

/s/ AUBREY E. ROBINSON, JR.
Judge

DATED: November 12, 1973

APPENDIX D
MEMORANDUM AND ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
April 3, 1974

Civil Action No. 2111-70

MARY P. LAFFEY, *et al.*,

Plaintiffs,

v.

NORTHWEST AIRLINES, INC.,

Defendant.

AUBREY E. ROBINSON, JR., District Judge.

MEMORANDUM

This matter is before the Court for entry of a Final Order with regard to damages and remedies. Findings of Fact and Conclusions of Law establishing liability herein were entered by the Court on November 12, 1973. The parties have intensively and thoroughly briefed and argued the present issues. Two matters merit brief comment.

The Court has not awarded liquidated damages under the Equal Pay Act. Implicit in this is a finding that Defendant has sustained its defense under 29 U.S.C. § 260. The Defendant did have reasonable grounds for belief that it was not violating the Equal Pay Act. While this Court has found as fact that the jobs of purser and stewardess are in fact equal, it was not unreasonable for the Company to have believed otherwise. Five factors support this conclusion: the traditional practice of the Company in treating the positions as unequal, the general industry practice to the

same effect, the acquiescence of the stewardesses' bargaining representative in this arrangement, the absence of any grievances or even suggestions from stewardesses to the contrary prior to the present controversy, and the absence of any clear legal precedent or guideline precisely in point. the Court finds "good faith" on the part of the Defendant and this finding is not inconsistent with the earlier finding of a "willful" violation of the Equal Pay Act. See Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139 (5th Cir. 1971). The Equal Pay Act violation was willful in that Defendant was fully aware of the Equal Pay Act and adopted a deliberate and knowing course of conduct despite its awareness. The Court does not find an intentional, bad faith, attempt to evade the law. The judgment of the Company that its conduct would not be found to be in violation of the Equal Pay Act has been found to be in error. The conduct of the Company in the exercise of that judgment was willful.

The second matter which warrants discussion is the recovery period for back-pay under Title VII. The Court has allowed a recovery period extending back two years from the date on which the charges herein were lodged with the Equal Employment Opportunity Commission. The Court has discretion to award back-pay to July 2, 1965, but has chosen to limit that award herein. The 1972 amendment to Title VII, 42 U.S.C. § 2000e-5(g), limiting back-pay liability to not more than two years prior to filing of charges with the E.E.O.C. is not applicable to this case. Nevertheless, it does indicate that Congress felt some limitation is appropriate to avoid "windfall" damage awards and to avoid harsh, and sometimes unbearable, economic burdens upon employers. The amendment also indicates that two years is an appropriate and reasonable period for measuring the adequacy of the remedy for the Plaintiffs. In light of these considerations, the Court has, in the exercise of its discretion, limited the recovery period.

ORDER

The Court having heretofore issued findings of fact and conclusions of law, 366 F.Supp. 763 and having held therein that defendant Northwest Airlines, Inc., violated the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2, enumerated respects; and all parties having filed briefs and presented oral argument with respect to the remedy questions; it is by the Court this 3rd day of April, 1974:

Ordered, as follows:

1. GENERAL INJUNCTION—The Defendant Northwest Airlines, Inc., and its officers, agents, employees, successors and all persons or organizations in active concert or participation with it, hereby are permanently enjoined and restrained from discriminating in any aspect of employment of cabin attendants on the basis of sex and from failing or refusing to fully implement, or to participate and cooperate in the implementation of, the provisions set forth in the body of this Order.

2. DEFINITIONS—For purposes of this Order, the following definitions shall apply:

(a) The term "Company" shall refer to Northwest Airlines, Inc.

(b) The term "Union" shall refer to Air Line Pilots Association, or any labor organization which succeeds it as bargaining representative of the Company's cabin attendants.

(c) The term "cabin attendant(s)" shall refer, collectively, to all American-based employees of the Company whose principal duties consist of providing inflight cabin service, whether denominated stewardess, purser, flight service attendant, steward, or otherwise.

(d) The term "Equal Pay Act plaintiff(s)" shall refer, collectively, to all female cabin attendants employed by the Company who filed timely written consents with this

Court, in accordance with 29 U.S.C. § 256, to become parties plaintiff with respect to the Equal Pay Act aspects of this lawsuit.

(e) The term "Title VII plaintiff(s)" shall refer, collectively, to all female cabin attendants employed by the Company at any time on or after July 2, 1965, excluding only those who filed timely written elections with this Court to be excluded from this lawsuit in its entirety.

(f) The term "Equal Pay Act recovery period" shall refer, for each Equal Pay Act plaintiff, to the period commencing three years prior to the date said plaintiff filed a written consent with this Court and ending on the date the Company equalizes wages in accordance with Paragraph 3 of this Order.

(g) The term "salary" shall refer to pay for services performed, as well as such other benefits (e.g. paid leave, life insurance) as are computed on the basis of salary.

3. EQUALIZATION OF WAGES—AFFIRMATIVE INJUNCTION

(a) *Salary:* Beginning with the date of this Order, the Company shall pay all female cabin attendants the salaries prescribed in the purser pay scale (base pay, and incentive pay if any) of the then-current collective bargaining agreement. The longevity of each female cabin attendant for purposes of applying the purser pay scale shall be her system seniority. Thereafter, the Company shall not reduce the salary of any female cabin attendant below the level to which said purser pay scale entitles her at any given time, her longevity for pay purposes at such time being her system seniority.

(b) *Pensions:* Beginning with the date of this Order, any pension payment made to any female cabin attendant shall be computed as though said female cabin attendant had been classified and paid as a purser throughout the period of her employment as a cabin attendant.

(c) *Lodging:* Beginning with the date of this Order, the Company shall furnish single rooms to all female cabin attendants on layovers, which shall not be inferior in quality to those heretofore provided to male cabin attendants. Thereafter, the Company shall not assign double rooms to any female cabin attendant, nor provide rooms to any female cabin attendant inferior in quality to those heretofore provided to male cabin attendants.

(d) *Uniform Cleaning Allowance:* Beginning with the date of this Order, the Company shall provide a quarterly uniform cleaning allowance to each female cabin attendant in accordance with the following standands as to eligibility and amount:

(i) Eligibility: To be eligible for a uniform cleaning allowance in a particular calendar quarter, she must have been employed as a cabin attendant on the first day of that quarter and she must have been so employed for the last full calendar month preceding such first day of the quarter.

(ii) *Amount:* The amount of the uniform cleaning allowance in each quarter shall be $13 prorated on the basis of the time on payroll as a cabin attendant employee in such quarter.

(e) *Prohibition against reducing wages to comply:* The Company shall not, contrary to 29 U.S.C. § 206(d)(1), reduce the wage rate of any employee in order (a) to accomplish the equalization required by this Paragraph 3 or (b) otherwise to comply with the provisions of 29 U.S.C. § 206(d)(1).

4. INJUNCTION AGAINST FUTURE WAGE DISCRIMINATION—The Company shall not, contrary to 29 U.S.C. § 206(d)(1) or 42 U.S.C. § 2000e-2(a) and (h), discriminate on the basis of sex between cabin attendants by paying wages to cabin attendants at a rate less than the rate at which it pays wages to cabin attendants of the opposite sex for equal work on jobs the performance of

which requires equal skill, effort, and responsibility and which are performed under similar working conditions.

5. MONETARY AWARD FOR THE EQUAL PAY ACT VIOLATIONS—The Company shall pay to each Equal Pay Act plaintiff the following monetary amounts:

(a) For each month during her Equal Pay Act recovery period in which she received a salary from the Company for service as a cabin attendant, the difference between the salary actually paid to her (including base pay, foreign flying supplement if any, and incentive pay if any) and the salary (base pay, and incentive pay if any) which would have been paid to her had she been compensated as a purser with longevity for pay purposes equal to her system seniority.

(b) If she received pension payments during her Equal Pay Act recovery period, the difference between the pension payments made to her and those which would have been made to her had they been computed on the basis of her having been classified and paid as a purser throughout the period of her employment as a cabin attendant.

(c) For each layover during her Equal Pay Act recovery period in which the lodging furnished by the Company required her to share a double room, the difference between one-half the value of the double room actually provided to her.

(d) For each calendar quarter from March 1, 1970 until the end of her Equal Pay Act recovery period, a uniform cleaning allowance in accordance with the following standards as to eligibility and amount:

(i) Eligibility: To be eligible for a uniform cleaning allowance in a particular calendar quarter, she must have been employed as a cabin attendant on the first day of that quarter and she must have been so employed for the last full calendar month preceding such first day of the quarter.

(ii) Amount: The amount of the uniform cleaning allowance in each quarter shall be $13 prorated on the basis of the time on payroll as a cabin attendant employee in such quarter.

6. BACKPAY UNDER TITLE VII FOR WAGE DISCRIMINATION AGAINST EQUAL PAY ACT PLAINTIFFS—The Company shall pay backpay to each Equal Pay Act plaintiff who was employed as a cabin attendant at any time between March 28, 1968 and the day preceding the commencement of her Equal Pay Act recovery period, to remedy the pay discrimination visited upon her during said period in violation of Title VII. The amount of backpay for each such Equal Pay Act plaintiff shall be as follows:

(a) For each month between March 28, 1968, and the day preceding the commencement of her Equal Pay Act recovery period in which she received a salary from the Company for service as a cabin attendant, the difference between the salary actually paid to her (including base pay, foreign flying supplement, if any, and incentive pay, if any) and the salary (base pay, and incentive pay, if any) which would have been paid to her had she been compensated as a purser with longevity for pay purposes equal to her system seniority.

(b) For each layover between March 28, 1968, and the day preceding commencement of her Equal Pay Act recovery period, the difference between one-half the value of the double room actually provided to her and the value of a single room had it been provided to her.

7. BACKPAY UNDER TITLE VII FOR WAGE DISCRIMINATION AGAINST TITLE VII PLAINTIFFS WHO ARE NOT ALSO EQUAL PAY ACT PLAINTIFFS—The Company shall pay backpay to each Title VII plaintiff who is not also an Equal Pay Act plaintiff to remedy the pay discrimination visited upon her in violation of Title VII. The amount of backpay for each such Title VII plaintiff shall be as follows:

(a) For each month between March 28, 1968, and the date upon which the Company equalizes wages in accordance with Paragraph 3 of this Order in which she received a salary from the Company for service as a cabin attendant, the difference between the salary actually paid to her (including base pay, foreign flying supplement, if any, and incentive pay if any) and the salary (base pay, and incentive pay, if any) which would have been paid to her had she been compensated as a purser with longevity for pay purposes equal to her system seniority.

(b) If she received pension payments at any time between July 2, 1965, and the date upon which the Company equalizes wages in accordance with Paragraph 3 of this Order, the differences between the pension payments made to her and those which would have been made to her had they been computed on the basis of her having been classified and paid as a purser throughout the period of her employment as a cabin attendant.

(c) For each layover between March 28, 1968, and the date upon which the Company equalizes wages in accordance with Paragraph 3 of this Order, the difference between one-half the value of the double room actually provided to her and the value of a single room had it been provided to her.

(d) For each calendar quarter from March 1, 1970, until the date upon which the Company equalizes wages in accordance with Paragraph 3 of this Order, a uniform cleaning allowance in accordance with the following standards as to eligibility and amount:

(i) Eligibility: To be eligible for a uniform cleaning allowance in a particular calendar quarter, she must have been employed as a cabin attendant on the first day of that quarter and she must have been so employed for the last full calendar month preceding such first day of the quarter.

(ii) Amount: The amount of the uniform cleaning allowance in each quarter shall be $13 prorated on the basis of the time on payroll as a cabin attendant employee in such quarter.

8. WEIGHT: NEGATIVE INJUNCTION—The Company shall not:

(a) Weigh female cabin attendants;

(b) Condition the employment of female cabin attendants upon their agreeing that they may be reprimanded, suspended (grounded) or terminated for failure to maintain a prescribed weight;

(c) Prescribe a weight scale to which female cabin attendants are required or expected to adhere;

(d) Reprimand, suspend (ground) or terminate any female cabin attendant because of her weight, unless her weight is such as to render her physically incapable of performing the duties of the job.

9. WEIGHT: AFFIRMATIVE INJUNCTION—The Company shall:

(a) Notify all female cabin attendants that it will no longer enforce any weight requirements other than that permitted by Paragraphs 8(d) of this Order;

(b) Notify all female cabin attendants who signed agreements conditioning their continued employment upon maintenance of a prescribed weight that such agreements will not be enforced;

(c) Remove from its Cabin Service Manual all materials relating to weight inconsistent with the prohibitions of Paragraph 8 of this Order.

(d) Offer immediate reinstatement, with system seniority intact, to each female cabin attendant terminated on account of weight on or after July 2, 1965;

(e) Immediately restore to flying status each female cabin attendant who is in suspended (grounded) status on account of weight on the date of this Order;

(f) Remove from each female cabin attendant's personnel files all records of warning reprimands, and/or discipline on account of weight; but preserve such records in a central location for so long as is necessary to compute backpay awarded under Paragraphs 10 and 11 of this Order.

10. WEIGHT: BACKPAY: TERMINATED EMPLOYEES--The Company shall pay to each Title VII plaintiff whose employment was terminated on account of her weight on or after July 2, 1965, backpay for the period between the date of said termination and the date reinstatement is offered in accordance with Paragraph 9(d) of this Order. The amount of backpay shall be the amount of wages she would have earned during said period (adjusted to the purser pay scale to the extent that the class of which she is a member is awarded backpay for work performed during said period), less the amount earned or earnable with reasonable diligence from other work during said period which would not have been performed had she not been terminated.

11. WEIGHT: BACKPAY: SUSPENDED (GROUNDED) EMPLOYEES—The Company shall pay to each Title VII plaintiff who lost salary by reason of a suspension (grounding) on account of her weight on or after July 2, 1965, backpay for the period of said suspension (grounding). The amount of backpay shall be the amount of wages she would have earned during said period (adjusted to the purser pay scale to the extent that the class of which she is a member is awarded backpay for work performed during said period), less the amount she earned from other work during said period which would not have been performed had she not been suspended (grounded).

12. EYEGLASSES: NEGATIVE INJUNCTION—The Company shall not:

(a) Forbid female cabin attendants to wear eyeglasses in flight;

(b) Condition the employment of female cabin attendants upon their agreeing that they will not wear eyeglasses in flight;

(c) Discriminate in hiring female cabin attendants on the basis of whether they wear eyeglasses and/or would wear eyeglasses in flight.

13. EYEGLASSES: AFFIRMATIVE INJUNCTION—The Company shall:

(a) Notify all female cabin attendants that it will no longer enforce any rule prohibiting the wearing of eyeglasses in flight, and remove any contrary material from its Cabin Service Manual;

(b) Notify all female cabin attendants who signed agreements conditioning their continued employment upon not wearing eyeglasses in flight that such agreements will not be enforced.

14. HEIGHT—The Company shall not refuse to hire female cabin attendants because of their height, if they are not taller than the Company has considered acceptable in hiring male cabin attendants at any time on or after July 2, 1965.

15. LUGGAGE: NEGATIVE INJUNCTION—The Company shall not restrict its female cabin attendants' choice of luggage to be carried onto the plane except that it may require that such luggage be in good condition and not of a size which would pose storage problems on the plane.

16. CHAIN OF COMMAND—The Company shall not establish a chain of command aboard flight which makes a female cabin attendant subordinate to a male cabin attend-

ant with lesser system seniority, irrespective of their job titles, and the Company shall revise its existing chain of command to conform to this requirement.

17. INJUNCTION AGAINST FUTURE DISCRIMINATION IN THE FILLING OF CABIN ATTENDANT POSITIONS—The Company shall not discriminate on the basis of sex in the filling of cabin attendant positions, irrespective of the title of the position and the job content thereof, unless sex constitutes a bona fide occupational qualification for the position within the meaning of 42 U.S.C. § 2000e-2(e)(1), nor shall the Company perpetuate the effects of past discrimination by according a preference to pursers not warranted by system seniority in the filling of any cabin attendant position which may hereinafter be created.

18. REMEDYING THE PRIOR DISCRIMINATION IN THE FILLING OF PURSER VACANCIES—Counsel for the plaintiffs, counsel for the Company, and counsel for the Union shall meet promptly after the signing of this Order, together with such additional persons as each of them may designate, and shall discuss the following questions:

(a) Whether, in light of this Order, maintenance of a separate purser job classification, with a separate set of monthly schedules to be bid separately, is desired;

(b) If so:

(i) What procedure should be adopted to determine who properly belongs on the purser list, and with what relative placement thereon, in light of the Court's findings as to discrimination in the filling of purser positions; and

(ii) What changes must be made in the criteria for determining entitlement to future placement on said list, and treatment following said placement, in light of the Court's findings of discrimination with respect to said criteria and treatment.

Not later than 60 days after the date of this Order, counsel for the parties shall report to the Court any agreement they have reached on this matter and, in the absence of agreement, they shall report to the Court their respective positions and the arguments in support of their positions. Upon receipt of such reports, the Court shall determine the appropriate remedy for the prior discrimination in the filling of purser vacancies.

19. INTEREST—With respect to all monies to be paid under the foregoing provisions of this Order, the Company shall pay six percent interest per annum from the date the violation occurred giving rise to said liability through the date upon which payment is made in accordance with this Order.

20. MECHANICS FOR PAYMENT PURSUANT TO THIS ORDER—Counsel for the plaintiffs and counsel for the Company shall meet promptly following the signing of this Order to establish procedures for determining the precise monetary amounts due to each employee pursuant to the provisions of this Order. All costs incurred in making said determinations shall be borne by the Company. The procedures adopted shall be such as to assure that payments shall be made as soon as possible, but in no event more than six months after this Order (unless the Court, for good cause shown, extends said deadline with respect to particular employees as to whom disputes have arisen concerning entitlement or computation). Any disputes as to entitlement or computation which cannot be resolved by agreement of counsel shall be referred to the Court for disposition.

21. IMPLEMENTATION—Counsel for the plaintiffs, counsel for the Company, and counsel for the Union shall be responsible, for a period of two years following this Order, to take such steps as may be necessary to assure compliance with this Order, in accordance with the procedure

described in this paragraph. Any complaint by any employee or by counsel for any party that the provisions of this Order have been violated shall be discussed initially by counsel. If they unanimously agree as to the correct disposition of a complaint, they may effectuate said disposition without the need for referring it to the Court, but shall maintain a written record of said complaint and disposition. If they do not unanimously agree as to the correct disposition of a complaint any one of them may refer the matter to the Court for disposition. The Company shall pay all expenses incurred by counsel in performing the functions assigned to them in Paragraphs 20 and 21 of this Order, including the travel expenses of plaintiffs' attorneys and shall pay a reasonable attorney's fee to the plaintiffs' attorneys for their services therefor.

22. LITIGATION EXPENSES—The Company shall reimburse plaintiffs for all reasonable expenses incurred on their behalf in litigating this action. Counsel for plaintiffs and counsel for the Company shall attempt to agree upon the amount thereof. In the absence of such agreement, they shall on or before the 90th day following this Order report their respective positions to this Court, and the Court shall thereupon determine the amount thereof.

23. ATTORNEY'S FEE—The Company shall pay a reasonable attorney's fee for plaintiffs' legal representation. Counsel for plaintiffs and counsel for the Company shall attempt to agree upon the amount thereof. In the absence of such agreement, they shall, on or before the 90th day following this Order, report their respective positions to the Court, and the Court shall thereupon determine the amount thereof.

24. RETAINED JURISDICTION—The Court hereby retains jurisdiction of this cause for the purpose of issuing any additional orders or decrees needed to effectuate, clarify, or enforce the full purpose and intent of this Order.

Judgment shall be entered accordingly.

APPENDIX E
ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
July 10, 1974

Civil Action 2111-70

MARY P. LAFFEY, *et al.*,

Plaintiffs,

v.

NORTHWEST AIRLINES, INC.,

Defendant.

ORDER

Upon consideration of Plaintiffs' Motion pursuant to Rule 52(b) Federal Rules of Civil Procedure for an amendment to Finding of Fact No. 78, and upon consideration of the Opposition thereto and the entire record herein, it is this 10th day of July, 1974:

ORDERED that this Court's Finding of Fact No. 78 is amended to read as follows (new matter underlined):

> "78. At all times since July 2, 1965, the job of purser and the job of stewardess have required equal skill, effort and responsibility and have been performed under similar working conditions."

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District Judge

DATE: July 10, 1974

APPENDIX F
MEMORANDUM AND ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
April 19, 1978

Civil Action No. 2111-70

MARY PAT LAFFEY *et al.*,

Plaintiffs,

v.

NORTHWEST AIRLINES, INC., *et al.*,

Defendants.

ROBINSON, D. J.: After a lengthy trial, this Court found that Northwest Airlines violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., and the Equal Pay Act of 1963, 29 U.S.C. § 206(d), in its treatment of female cabin attendants in a number of respects, including Defendant's practice of providing single rooms to males on layovers and double rooms to females, and of providing a uniform cleaning allowance only to men.[2] On April 3, 1974, the Court entered final judgment in the case, providing back pay as well as prospective injunctive relief.[3] Paragraph 3(c) of the Court's Order requires Defendant to furnish single rooms to all female cabin attendants on layovers; paragraph 3(d) orders Defendant to provide a quarterly cleaning allowance to each female cabin

[2] See Findings of Fact and Conclusions of Law issued on November 12, 1973, 366 F.Supp. 763; see in particular Findings of Fact 39(5), 39(6) and 39(12).

[3] See 374 F.Supp. 1382.

attendant.[4] These injunctive provisions were stayed pending appeal[5] and pending the disposition of a petition for a writ of certiorari. The Supreme Court denied certiorari on February 21, 1978,[6] and the mandate was returned to this Court on March 7, 1978. On March 20, 1978, Northwest Airlines moved this Court to clarify or modify the injunction herein with respect to the lodging and uniform provisions. The Court has considered Defendant's submissions in support of its motion, the oppositions to Defendant's motion,[7]

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[4] The Court's Order provides in pertinent part:

(c) Lodging: Beginning with the date of this Order, the Company shall furnish single rooms to all female cabin attendants on layovers, which shall not be inferior in quality to those heretofore provided to male cabin attendants. Thereafter, the Company shall not assign double rooms to any female cabin attendant, nor provide rooms to any female cabin attendant inferior in quality to these heretofore provided to male cabin attendants.

(d) Uniform Cleaning Allowance: Beginning with the date of this Order, the Comapany shall provide a quarterly uniform cleaning allowance to each female cabin attendant in accordance with the following standards as to eligibility and amount:

(i) Eligibility: To be eligible for a uniform cleaning allowance in a particular calendar quarter, she must have been employed as a cabin attendant on the first day of that quarter and she must have been so employed for the last full calendar month preceding such first day of the quarter.

(ii) Amount: The amount of the uniform cleaning allowance in each quarter shall be $13 prorated on the basis of the time on payroll as a cabin attendant employee in such quarter.

[5] On October 20, 1976, the Court of Appeals entered its opinion and judgment, sustaining the district court's adjudications on all substantive questions of statutory infringement, and remanding the case for consideration of certain issues concerning good faith, recovery period, and eligible class members. See 567 F.2d 429.

[6] See 46 Law Week 3518.

[7] The Equal Employment Opportunity Commission and the Secretary of Labor have submitted briefs in opposition to Defendant's motion and

(Continued on next page)

the arguments of counsel at hearing in the matter, and the entire record in this case. For the reasons discussed below, the Court concludes that Defendant's motion must be denied.

Defendant bases its request for modification[8] of the Court's injunction on the grounds that because of intervening changes in Northwest Airlines' employee policy and in the relevant collective bargaining agreement between Northwest Airlines and its cabin attendants, it is no longer equitable to enforce paragraphs 3(c) and 3(d) as written. In essence, Defendant asks that paragraph 3(c) be modified to allow a double-room layover policy applied by Northwest Airlines in a sexually blind manner and that paragraph 3(d) be modified to permit Northwest Airlines to do away with the requirements of a quarterly uniform cleaning allowance for female employees.[9] Defendant argues that the Equal

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(Footnote 7 continued)
request leave to file such briefs as amici curise. The Court deems it appropriate to allow the EEOC and the Secretary of Labor to participate as amici curiae.

[8] While Defendant frames its motion in terms of clarification or modification, the Court finds no ambiguity or lack of precision in the existing order which would warrant clarification. What Defendant seeks by its motion is an alteration of the provisions of the present injunction.

[9] Northwest Airlines and the Air Line Pilots Association, the then bargaining representative of the cabin attendants, signed a collective bargaining agreement on December 20, 1975, while this case was pending in the Court of Appeals. That agreement, effective January 31, 1976, alters, in some respects, the package of cash and fringe benefits previously enjoyed by Northwest employees. The provisions on lodging contained in the collective bargaining agreement is [are] identical in substance to the agreement in force at the time this lawsuit was initiated and would allow Northwest to assign rooms to cabin attendants on layovers on a double-occupancy basis. The new contract eliminates cleaning allowances for all cabin attendants and substitutes payment by Northwest for the entire cost of the periodic replacement of

(Continued on next page)

Pay Act's proscription against "downward equalization" does not prevent the Court from granting the relief requested.

At the outset, the Court finds no changed circumstances which would warrant modification of the injunction herein. Developments in collective bargaining have no relevance to the vindication of rights under Title VII and the Equal Pay Act, *Laffey* v. *Northwest Airlines, Inc.*, [12 EPD ¶ 11,216] 567 F.2d 429, 446-447 (D.C. Cir. 1976), and are of no import to the Court in fashioning relief in this case. Nor does the alleged change in Northwest Airlines' room-sharing policy justify revision of the Court's 1974 Order. Defendant never challenged this Court's single room requirement as an inappropriate remedy and cannot litigate that issue now. More significantly, Defendant's policy switch is not the sort of event which entitles Defendant to relief from final judgment under Rule 60(b) of the Federal Rules of Civil

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(Footnote 9 continued)
selected uniform items for both male and female cabin attendants. Based in part on these developments in collective bargaining, Defendant has requested that paragraphs 3(c) and 3(d) of the Court's injunction be modified to read as follows:

(c) Lodging: The Company shall furnish rooms to all female cabin attendants on layovers in accordance with the policy established under the then-current collective bargaining agreement, which policy shall be applied without discrimination in favor of or against either male cabin attendants or female cabin attendants.

(d) Uniforms. The Company shall furnish, to male and female cabin attendants, without discrimination in favor of or against either male or female cabin attendants any uniform cleaning allowance or uniform replacement allowance provided for in the then-current collective bargaining agreement, in accordance with the following standards.

(i) Cleaning Allowances. A uniform cleaning allowance, if any, shall be equal in amount for eligible male and female cabin attendants, and the same standards of eligibility shall be applied;

(ii) Uniform replacement allowances. A uniform replacement allowance, if any, shall be extended to eligible male and female cabin attendants in the same proportion, whether full cost or partial cost.

Procedure. *Mayberry* v. *Maroney*, 558 F.2d 1159, 1163-1164 (3d Cir. 1977).

The Court also finds that Northwest Airlines' proposed modification would be contrary to this Court's intent in formulating a remedy for the statutory violations in this lawsuit and would constitute a "downward equalization" of benefits in violation of Title VII and the Equal Pay Act.[10] The Court rejects Defendant's argument that the Equal Pay Act's proscription against equalizing downward is limited to "wage rates" and does not apply to the total package of remuneration afforded an employee.[11] Nor is the Court persuaded that the ban on downward adjustment simply requires that the total remuneration package not be reduced. The Court finds that Defendant's reliance upon the total package of compensation received by cabin attendants is misplaced. The value of the single room requirement, for example, is not calculable simply in monetary terms and is in no way equatable to other benefits offered Northwest employees. The Court refuses to become involved in whether the total compensation package received by cabin attendants today is more or less than the compensation package enjoyed by male and female employees at the time of this Court's Order. Defendant's requested modification would effectively eliminate single-room lodging and periodic uniform cleaning allowances, advantages which male employees enjoyed when this litigation was initiated. This constitutes downward equalization and is impermissible.

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[10] See *Corning Glass Works v. Brennan*, [7 EPD ¶ 9374B] 417 U.S. 188, 206-207 (1974). While the Court's authority to direct equalization arises under Title VII and not the Equal Pay Act, the Court is persuaded that the provisions of both acts should be read in pari materia, *Laffey v. Northwest Airlines, Inc.*, 567 F.2d at 446, and that the Equal Pay Act's prohibition against equalizing downward obtains here.

[11] See 29 U.S.C. § 206(d)(1). Neither the language of the statute nor anything in the legislative history indicates that the prohibition against equalizing downward does not extend to so-called "fringe benefits."

The Court concludes that Northwest Airlines has failed to make the requisite showing entitling it to modification of the injunction herein and that Defendant's motion to clarify or modify this Court's Order dated April 3, 1974, must be denied.

Ordered, that the motions of the Equal Employment Opportunity Commission and of Secretary of Labor Ray Marshall for leave to file memoranda as *amici curiae* be and are hereby Granted; and it is

Further Ordered, that Defendant's Motion to Clarify or Modify Injunction be and it is hereby Denied.

APPENDIX G
ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
July 9, 1979

Civil Action No. 2111-70

MARY P. LAFFEY, *et al.*,

Plaintiffs,

v.

NORTHWEST AIRLINES, INC.,

Defendant.

ORDER DENYING MOTION TO MODIFY AWARD OF BACKPAY TO THE TITLE VII CLASS

Upon consideration of the Motion of Defendant Northwest Airlines, Inc. to Modify the Award of Backpay to the Title VII Class, with supporting Memorandum of Points and Authorities, Plaintiffs' Memorandum in Opposition, Defendants' Reply Memorandum and supporting documents, and argument of counsel, and it appearing that the relief requested is precluded by the Judgment of the Court of Appeals in that it is beyond the Mandate of that Court and seeks to raise issues not challenged on appeal, therefore it is by the Court this 9th day of July, 1979,

ORDERED, that the Motion to Modify the Award of Backpay to the Title VII Class be DENIED.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District Judge

APPENDIX H
ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
July 9, 1979

Civil Action No. 2111-70

MARY P. LAFFEY, *et al.*,

Plaintiffs,

v.

NORTHWEST AIRLINES, INC.,

Defendant.

ORDER

Upon Consideration of the Opinion of the United States Circuit Court of Appeals for the District of Columbia Circuit in *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), and the Mandate of that Court returned to this Court on March 7, 1978, and upon consideration of the Motion of Defendant, Northwest Airlines, Inc., for Reconsideration of Adjudication of Liability, with Memorandum of Points and Authorities in Support of the Motion and Plaintiffs' Memorandum in Opposition thereto and Defendant's Reply Memorandum and the supporting documents filed herein, it is by the Court this 9th day of July, 1979,

ORDERED, that the Motion is hereby DENIED.

/s/ AUBREY E. ROBINSON, JR.

Aubrey E. Robinson, Jr.
United States District Judge

APPENDIX I
MEMORANDUM AND ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
July 9, 1979

Civ. A. No. 2111-70

MARY P. LAFFEY *et al.*,

Plaintiffs,

v.

NORTHWEST AIRLINES, INC.,

Defendant.

MEMORANDUM AND ORDER

AUBREY E. ROBINSON, Jr., District Judge.

With respect to the Title VII backpay recovery period, this Court has been directed to do two things: first, determine the local statute of limitations most appropriate to this case and thus determine "the outermost limit on awards of Title VII backpay," *Laffey v. Northwest Airlines, Inc.*, 185 U.S. App.D.C. 322, 362, 567 F.2d 429, 469 (D.C. Cir.1976), and second, "reconsider, in light of *Albermarle* and this opinion, the need to limit the backpay remedy here." *Id.*, 185 U.S.App.D.C. at 364, 567 F.2d at 471.

As recently as last year, the D.C. Circuit in *Forrestal Village, Inc. v. Graham*, 179 U.S.App.D.C. 225, 227, 551 F.2d 411, 413 (D.C.Cir.1977), declared:

> It is well established that when, as here, Congress has created a federal right but has not prescribed a limitation period for enforcement, federal courts will borrow the period of limitation prescribed by the state where the court sits (citations omitted). . . . that "best effectuates the federal policy involved."

This is consistent with the principle announced by the Supreme Court in *Cope v. Anderson*, 331 U.S. 461, 67 S.Ct. 1340, 91 L.Ed. 1602 (1947).

The District of Columbia has no borrowing statute and follows the common law that a statute of limitations is procedural. 2 J. Moore, *Federal Practice* ¶ 3.07[3] (2nd ed. 1948). This is evidenced by the consistent rulings of the United States Court of Appeals prior to 1971 when it was the "highest state Court" and has been reaffirmed by the District of Columbia Court of Appeals. The same conclusion was reached by Judge Richey in his analysis of the law in *Monatee Cablevision Corp. v. Pierson*, 433 F.Supp. 571 (D.D.C.1977).

It is the settled law in this circuit that when, as in a Title VII case, the action is considered purely legal or one in which the Court has concurrent jurisdiction in law and equity, the District of Columbia statute of limitations applies. *Cassell v. Taylor*, 100 U.S.App.D.C. 153, 243 F.2d 259 (D.C.Cir.1957). This Court is without authority or precedent to consider the statute of limitations of some other state to fashion a federal common law period of limitation. As stated by the Court in *Laffey, supra*, 185 U.S. App.D.C. at 361, 467 F.2d at 468:

> Most often this is effected by adopting the period prescribed by the most analogous state statute. Because of its convenience, and of the notice it presumably affords prospective litigants, adoption of the state limitation period is proscribed only when it would create important conflicts with the federal policy underlying the cause of action, or when it would amount to discriminatory restriction of a federal right of action. *Neither of those conditions exists here.* (emphasis added).

A search of the statutes of the District of Columbia reveals only two which can be considered relevant in determining which limitation period is most appropriate

for this case: (1) the D.C. Minimum Wage Law, which prescribes a three-year limitations period for all actions "to enforce any cause of action for unpaid wages or liquidated damages under this subchapter," D.C.Code § 36-416, and (2) the general statute of limitations, D.C.Code § 12-301, which provides as follows:

> § 12-301. *Limitation of time for bringing actions*
>
> Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:
>
> * * *
>
> (8) for which a limitation is not otherwise specially prescribed—3 years.

The District of Columbia Minimum Wage Law, as originally enacted in 1918, provided:

> This subchapter shall be known as the "District of Columbia Minimum-Wage Law." The purposes of the subchapter are to protect the women and minors of the District from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of living; and the subchapter in each of its provisions and in its entirety shall be interpreted to effectuate these purposes.

D.C.Code § 36-401, Sept. 19, 1918, ch. 174, Title I, § 23, 40 Stat. 964. The statute provided that any woman worker paid less than the minimum wage by her employer could bring suit to recover the full amount of the minimum wage less any amount paid to her and reasonable attorneys fees. In 1966, Congress revised this statute to include men and modeled its provisions after the Fair Labor Standards Act. Its enforcement provision, D.C.Code § 36-415, tracks the enforcement provisions of the FLSA, 29 U.S.C. §§ 216(b), 256, 260, and further provides a three year limit for suits for unpaid wages or liquidated damages. D.C.Code § 36-416.

Congress has made equal pay discrimination an FLSA and a Title VII violation. Since the two statutes are to be construed *in pari materia*, *Laffey supra*, 185 U.S.App.D.C. at 359, 567 F.2d at 466, D.C.Code § 36-416 may be considered "most analogous" for the purposes of the inquiry in this action.

Absent a D.C. statute sufficiently analogous to justify selection, a three year limitation period would still result. The D.C.Code provides a three year limitation on actions for which other specific limitations have not been specified. D.C.Code § 12-301(8). *Cassell*, in construing this provision in its earlier code form, held it to be sufficiently broad to include enforcement of federally created rights. *Cassell*, *supra*, 100 U.S.App.D.C. at 154 n. 3, 243 F.2d at 260 n. 3. This statute also leads to a three year period of limitation.

The Court in *Laffey* has determined that there is discretionary power to limit as well as deny backpay in Title VII actions. With respect to this power to limit backpay, the Court declared:

> Nevertheless, the power to limit backpay is subject to restraints. As a partial denial of backpay, authority to limit must be as narrowly constrained as authority to totally deny; its exercise, therefore, must be supported by reasons faithful to the dual purpose attributed to the backpay remedy by the *Albemarle* Court. Firstly, a "reasonably certain prospect of a backpay award 'provide[s] the spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history'". Secondly, backpay "make[s] persons whole for injuries suffered on account of unlawful employment discrimination."

Laffey, *supra*, 185 U.S.App.D.C. at 364, 567 F.2d at 471.

Defendant has advanced three arguments for a limitation of backpay. First, since wages were not equalized until

January 1976, the millions of dollars involved will be more than sufficient to deter future violations, regardless of the limitation period ultimately applied by the Court. Second, stewardesses must be prevented from receiving more than that to which they are entitled in order to be made whole. Third, Plaintiffs slept on their rights by not filing this action sooner. An examination of these reasons leads this Court to conclude that they are without merit when measured by the standards of *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

With respect to the size of the award, it is nowhere suggested in *Albemarle* that this is a factor to be considered by the Court in limiting the amount of the backpay award. Within the outer limits set by the applicable statute of limitations, plaintiffs who have been found to be victims of sex discrimination are entitled to that amount of backpay which will make them whole. A "reasonably certain prospect of a backpay award . . . 'provide[s] the spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this Country's history.'" *Albemarle, supra*, at 417-18, 95 S.Ct. at 2371-2372. The size of the backpay claim relates directly to the massive wrong it inflicted upon the Plaintiffs. If wrongs may remain uncompensated because they are expensive to the wrongdoer, it would violate the instruction of Albemarle that "backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle, supra*, at 421, 95 S.Ct. at 2373.

Northwest's reliance upon *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), as authority for reducing the backpay award here is misplaced. Backpay in *Manhart* was denied because

of the disastrous effect it would have on the employees' pension fund whose assets were earmarked solely for the benefit of the employees. In effect, the Court in *Manhart* prevented innocent employees from shouldering a substantial financial burden imposed upon their retirement system by a wrongdoing defendant. The limitation was necessary to protect them by not jeopardizing the solvency of pension plans from which they anticipated benefits.

Northwest's second argument is totally without merit. This Court's findings of Title VII and Equal Pay Act wage discrimination against female cabin attendants have been affirmed. "Equalization upward" to the rate of pay for males is the remedy prescribed in the Equal Pay Act, and is the remedy under Title VII as well as where the statutes overlap. *Corning Glass Works v. Brennan*, 417 U.S. 188, 206-207, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974).

Albemarle presented the Court with considerations involving backpay claims that are readily distinguishable from those here involved. From the inception of this litigation, Plaintiffs herein vigorously demanded backpay for the discriminatory wages paid to female cabin attendants. At no time were their backpay claims waived or abandoned. Their position remains clear and unchanged.

In *Albemarle*, the Plaintiffs initially disclaimed any interest in backpay, and first asserted their backpay claim five years after the complaint was filed. Because the employer claimed "prejudice" by this course of conduct, the Court ruled that the peculiar facts of that case might entitle the District Court to deny packpay, saying:

> [A] party may not be "entitled" to relief if its conduct of the cause has improperly and substantially prejudiced the other party. The [plaintiffs] here were not merely tardy, but also inconsistent, in demanding

> backpay. To deny backpay because a *particular* cause has been prosecuted in an eccentric fashion, prejudicial to the other party, does not offend the broad purposes of Title VII. This is not to say, however, that the District Court's ruling was necessarily correct. Whether the [defendants] were in fact prejudiced, and whether the [plaintiffs'] trial conduct was excusable, are questions that will be open [following remand] . . . On these issues of procedural regularity and prejudice, the "broad aims of Title VII" provide no ready solution. (emphasis in original).

Albemarle, supra, 422 U.S. at 424-25, 95 S.Ct. at 2375.

Northwest does not and cannot claim prejudicial reliance on Plaintiffs' conduct in litigating their backpay claims. Defendant simply took the position that Plaintiffs' position lacked merit and that its own actions would ultimately be sustained. No one of Northwest's policies concerning wage differentials between male and female cabin attendants was changed one wit as a result of this litigation until after this Court's adjudication that they were discriminatory. Additionally, there was no delay by Plaintiffs here in filing their backpay claims; there was no "eccentricity" in prosecuting.

Accordingly, it is Decreed this 9th day of July, 1979, that:

1) The statute of limitations most appropriate to determine the Title VII backpay awards is three (3) years;

2) There are no circumstances in this case warranting the withholding of backpay for any portion of the limitation period;

3) The appropriate starting date for Title VII backpay herein is March 28, 1967, (three years prior to the filing of the first EEOC charge upon which this lawsuit is based), and that that date shall be used in implementing this Court's Order of April 3, 1974, instead of the dates specified in Paragraphs 6, 6(a), 6(b), 7(a), 7(b), 7(c), 10 and 11 of said Order.

APPENDIX J
MEMORANDUM AND ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
November 21, 1980

Civil Action No. 2111-70

MARY PAT LAFFEY, *et al.*,

Plaintiffs,

v.

NORTHWEST AIRLINES, INC.,

Defendant.

ROBINSON, D.J.: The issue addressed by the Court upon remand concerns Plaintiffs' entitlement to liquidated damages in the above-captioned litigation. This Court has heretofore issued findings of fact and conclusions of law in the above-captioned litigation. This Court has heretofore issued findings of fact and conclusions of law in the above-captioned case, 366 F.Supp. 763, and held that Defendant Northwest Airlines, Inc., violated the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1). The Court found, however, that Defendant acted in good faith, and refused to award liquidated damages, 374 F. Supp. 1382, 1390. The Court of Appeals directed this Court to reconsider the matter of liquidated damages *in toto* in light of its decision in *Laffey v. Northwest Airlines, Inc.* [12 EPD ¶11,216], 567 F.2d 429(D.C. Cir. 1976).

I. The Statutory Scheme

Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b) provides:

> Any employer who violates the provisions of [the FLSA] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and *in an additional equal amount as liquidated damages.* (Emphasis added)

Originally mandatory in its provision, the Act was amended in 1947 to make the imposition of liquidated damages within the discretion of the court where the employer shows (1) "that the act or omission giving rise [to the violation] was in *good faith*" and (2) "that he had *reasonable grounds* for believing that his act or omission was not a violation of [the Act]". (Emphasis added) (29 U.S.C. § 260). Only if the employer satisfies the court that both factors existed and underlined his conduct can he urge the court to deny liquidated damages—even then, the court may, in its discretion, award liquidated damages.

In remanding the question of liquidated damages, the Court of Appeals offered guidelines for determining an employer's good faith and reasonable grounds for his belief. To establish good faith, the employer must have "an honest intention to ascertain what the . . . Act requires and to act in accordance with it." *Id,* at 464. Where the law is ambiguous or complex the employer may, in good faith, be misguided; however, to constitute the subjective good faith required by the Act, the legal complexity must itself "pervade and markedly influence" the employer's belief. *Id.*, at 466.

In addition, to establish that his failure to comply with the Act was predicated on reasonable grounds for a belief that he was in compliance, the employer must point to specific factors that formed a foundation for a *positive* belief that in fact there was compliance with the demands of the law. Factors such as the industry's custom, the employer's tradition, the employee's acquiescence or the union's role cannot provide reasonable grounds for believing what the *law* requires. *Id.*, at 464.

II. Defendant's Contentions

Preliminarily, Defendant asserts that this Court's original finding of good faith was not questioned by the Court of Appeals and should not be disturbed. This assertion is erroneous. The Court of Appeals found that the factors relied on by this Court to support the finding of good faith were inadequate, and remanded the issue for redetermination *"in toto."* *Id.*, at 466.

Defendant further contends that several factors demonstrate both its honest intention to ascertain and act in accordance with the law, and its reasonable grounds for believing it was doing so, to wit: (1) the Company's lawyers and personnel department officials (a) conducted a personal review of the Equal Pay Act and Civil Rights Act, (b) measured the Company's personnel practices against the Act, and (c) concluded that purser and stewardess positions were different; (2) the Company eliminated other personnel practices believed to be in violation of the Act,[1] (3) the Company bargained collectively with union representatives to establish the different compensation rates; (4) the Company relied on a statement made by the EEOC, in its investigation of the no-marriage rule, that purser/stewardess duties were different; (5) the Company obtained an opinion from outside counsel, after the law suit was filed, that the positions were different; (6) the Company retained an independent expert to do a time study of the purser/stewardess positions, after the lawsuit was filed, which concluded that different responsibilities attached to the two positions; and (7) the Company adhered to its belief that the purser and stewardess positions were different throughout the litigation.

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[1] In 1967, Defendant terminated its practice of removing from cabin attendant status all females who reached age 32, of terminating the employment of female cabin attendants who married, and of confining purser positions to men.

The factors relied upon by Defendant to show both good faith and a reasonable basis do not constitute the degree of genuine effort required of an employer to study the law, investigate the impact of the law on existing personnel policies, conform its policies to the requirements of the law, and assure itself that it has a reasonable foundation for a *positive* belief that in fact its policies comply with the law. Especially in the airline industry, where the prevailing practice was to make job distinctions on the basis of sex, the employer must diligently analyze possible violations of the Equal Pay Act.

The specific actions taken by Defendant to ascertain and act in accordance with the Act fall short of the standard mandated by the Court of Appeals. Company lawyers and personnel officials internally reviewed the Equal Pay Act for its possible application to the Company and, though acknowledging that male and female employees could not be paid differently for the same jobs, concluded that the jobs of purser and stewardess were *in fact* different. This they concluded without consulting the in-flight supervisors responsible for knowing the duties of each, without commissioning a study of the jobs (as they did nine years later), and without scrutinizing the jobs for differences in duties. There is nothing in the language, history, interpretation or purposes of the Equal Pay Act which was so ambiguous, complex or uncertain as to misguide Defendant and influence its decision on what was demanded by the law. Defendant was in the position to study and know the nature of the work being performed by its employees. For it to erroneously conclude that the jobs were different was not a consequence of *legal* uncertainty. Moreover, no written memorandum on the subject was prepared or received by the Company, and no consultations with outside counsel were solicited prior to the onset of this litigation.

Furthermore, Defendant's contention that it was misguided "as a matter of law" to believe that wages established through collective bargaining could not be sex-based is without merit. Such a legal conclusion was directly contrary both to the language of the Equal Pay Act and to a published interpretation of the Act by the Wage-Hour Administrator. The Interpretative Bulletin stated, in pertinent part:

> Where equal work is being performed within the meaning of the statute, a wage rate differential which exists between male and female employees *cannot be justified on the ground that is is a result of negotiation by the union with the employer, for* negotiation of such a discriminatory wage differential is prohibited under the terms of the equal pay amendment. (emphasis added).

Department of Labor, Wage and Hour Division, "Interpretative Bulletin on Equal Pay for Equal Work," § 800.106 (April 25, 1964). Had Defendant exercised an honest intention to ascertain what the Act required, it would have understood that a collective bargaining agreement could not immunize an employer from the Act's requirements. The Act and interpretative bulletins are unequivocal. Here, as in *Mayhew, Inc. v. Wirtz*, 413 F.2d 658, 663 (4th Cir. 1969), the law was clear

> . . . and the employer knew it. "If he did not know, it was because he did not look, or looking, did not see, or want to see what was so plainly there."

The other contentions made by Defendant are equally unpersuasive in showing good faith and a reasonable basis. The fact that the Company terminated *other* discriminatory personnel practices—after considerable delay and an EEOC finding of probable violations—adds nothing to justify its failure to terminate *this* discriminatory practice. No reasonable basis for believing it was in full compliance with the Act is provided from partial elimination of violative practices.

Defendant's purported reliance on an EEOC statement that the duties of purser and stewardess were different is also misplaced. The statement was made in the course of an EEOC investigation of Title VII violations arising from Defendant's practices of firing stewardesses who married, and of denying stewardesses access to purser positions. Finding probable cause to believe that Defendant's practices violated Title VII, the EEOC merely looked to the job descriptions in the collective bargaining agreement for the limited purpose of determining whether sex was a bona fide occupational qualification which would justify limiting the purser position to men. The EEOC merely recited the Defendant's own job descriptions. It did not address whether the jobs were identical, as the charge it was investigating did not involve an "equal pay for equal work" claim. Finally, the EEOC is not the agency charged with enforcing the Equal Pay Act. The fact that one federal agency investigating a particular labor practice did not register a complaint about another labor practice not under investigation carries no evidentiary significance and offers no reasonable basis for a good faith/reasonable belief in compliance.

The actions taken by Defendant *after* the lawsuit was filed again fail to satisfy its burden of showing an honest intention to comply prior to commencement of litigation. The fact that outside counsel, retained after the lawsuit was brought, concluded that the jobs of stewardess and purser were not legally identical could not have influenced Defendant's decision to compensate them differently. Likewise, the retention of a consulting firm to conduct a time study of the jobs, on the eve of trial, could not have been a basis for Defendant's behavior for all the intervening years since the Equal Pay Act was enacted to pay stewardesses less then pursers.

Defendant has thus failed to satisfy its burden of showing good faith and reasonable grounds for believing that it was in compliance with the Equal Pay Act by paying

stewardesses less then pursers. An appropriate Order follows this Memorandum Opinion.

Order

Upon consideration of the Memorandum Opinion entered this date, it is by the Court this 21st day of November, 1980,

Ordered, that Defendant pay an additional amount equal to the backpay previously ordered by this Court as liquidated damages, pursuant to Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b).

APPENDIX K
ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
November 30, 1982

Civil Action
No. 2111-70

MARY PAT LAFFEY, *et al.*,

Plaintiffs,

v.

NORTHWEST AIRLINES, INC.,

Defendant.

ORDER RESPECTING COMPUTATION OF BACKPAY AND IMPLEMENTATION OF FINAL JUDGMENT

The Court having found the Defendant, Northwest Airlines, Inc., liable (366 F. Supp. 763) for violations of the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, and having awarded backpay in accordance with the Order filed April 3, 1974 (374 F. Supp. 1382), as modified by the court of appeals (567 F.2d 429), and by subsequent stipulations and orders of this Court; and counsel for the plaintiffs and counsel for the Company having completed their joint responsibility, assigned in Paragraph 20 of this Court's Order of April 3, 1974, to determine "the precise monetary amounts due to each employee" pursuant to this Court's rulings; and said counsel having tendered to the Court a print-out which they jointly certify reflects said monetary amounts (including interest calculated through November 30, 1982); and the Court being satisfied from the report submitted by counsel describing the procedures they utilize that counsel exercised appropriate safeguards to as-

sure the accuracy of the amounts specified in the tendered print-out; and the Court having decided to enter Final Judgment on this date; it is this 30th day of November, 1982, ORDERED:

INTRODUCTION

Paragraphs 1 through 9 of this Order are intended to provide a useful recapitulation of the various orders entered by this Court during the course of this litigation that collectively determined "the precise amounts due" each cabin attendant. Said Paragraphs 1 through 9 are not intended to effect any substantive change from the various orders recapitulated therein. Should it develop that there is (or arguably is) a conflict between Paragraphs 1 through 9 of this Order and the prior orders which said paragraphs attempt to recapitulate, the prior orders (and not Paragraphs 1 through 9 of this Order) shall control.

1. DEFINITIONS—

(a) The term "Equal Pay Act plaintiff(s)" refers, collectively, to all female cabin attendants employed by the Company who filed timely written consents with this Court, in accordance with 29 U.S.C. § 256, to become parties plaintiff with respect to the Equal Pay Act aspects of this lawsuit.

(b) The term "Title VII plaintiff(s)" refers, collectively, to all female cabin attendants employed by the Company at any time on or after January 29, 1970 (and certain other female cabin attendants who are to be treated as eligible for full or partial Title VII backpay by reason of detrimental reliance on certain class notices), except for those female cabin attendants who filed timely written elections with this Court to be excluded from this lawsuit in its entirety.

(c) The term "Equal Pay Act recovery period" refers, for each Equal Pay Act plaintiff, to the period commencing

three years prior to the date said plaintiff filed a written consent with this Court and ending on March 31, 1978, or the last day said plaintiff received compensation from the Company, whichever is earlier.

(d) The term "salary" refers to pay for services performed as well as such other benefits (*e.g.*, paid leave, life insurance) as are computed on the basis of salary.

2. MONETARY AWARD FOR THE EQUAL PAY ACT VIOLATIONS—The monetary amounts that the Company is to pay to each Equal Pay Act plaintiff for violations occurring during her Equal Pay Act recovery period have been awarded on the following basis:

(a) For each month during her Equal Pay Act recovery period in which she received a salary from the Company for service as a cabin attendant, the difference between the salary actually paid to her (including base pay, foreign flying supplement if any, and incentive pay if any) and the salary (base pay, and incentive pay if any) which would have been paid to her had she been compensated as a purser with longevity for pay purposes commencing on June 18, 1964, or the date on which she became a cabin attendant, whichever is later.

(b) For her layovers between the commencement of her Equal Pay Act recovery period and March 6, 1978, the amount allocated to her for that period in accordance with the formula contained in the stipulation of the parties filed on December 15, 1980, and approved by the Court on December 16, 1980.

(c) For each calendar quarter from March 1, 1970, until the end of her Equal Pay Act recovery period, a uniform cleaning allowance in accordance with the standards as to eligibility and amount set forth in paragraph 3(d) of the Final Judgment.

3. BACKPAY UNDER TITLE VII FOR WAGE DISCRIMINATION AGAINST EQUAL PAY ACT PLAINTIFFS—The backpay that the Company is to pay to each Equal Pay Act plaintiff who was employed as a cabin attendant at any time between April 29, 1967, and the day preceding the commencement of her Equal Pay Act recovery period, for violations occurring prior to the commencement of her Equal Pay Act recovery period, has been awarded on the following basis:

(a) For each month between April 29, 1967, and the day preceding the commencement of her Equal Pay Act recovery period in which she received a salary from the Company for service as a cabin attendant, the difference between the salary actually paid to her (including base pay, foreign flying supplement, if any, and incentive pay, if any) and the salary (base pay, and incentive pay, if any) which would have been paid to her had she been compensated as a purser with longevity for pay purposes commencing on July 2, 1965, or the date of her first service as a cabin attendant, whichever is later.

(b) For her layovers between April 29, 1967, and the day preceding commencement of her Equal Pay Act recovery period, the amount allocated to her for that period in accordance with the formula contained in the stipulation of the parties filed on December 15, 1980, and approved by the Court on December 16, 1980.

4. BACKPAY UNDER TITLE VII FOR WAGE DISCRIMINATION AGAINST TITLE VII PLAINTIFFS WHO ARE NOT ALSO EQUAL PAY ACT PLAINTIFFS—The backpay that the Company is to pay to each Title VII plaintiff who is not also an Equal Pay Act plaintiff has been awarded on the following basis:

(a) For each month between April 29, 1967, and January 31, 1976, for which she received a salary from the Company for service as a cabin attendant, the difference between the

salary actually paid to her (including base pay, foreign flying supplement, if any, and incentive pay, if any) and the salary (base pay, and incentive pay, if any) which would have been paid to her had she been compensated as a purser with longevity for pay purposes commencing on July 2, 1965, or the date of her first service as a cabin attendant, whichever is later.

(b) For her layovers between April 29, 1967 and March 6, 1978, the amount allocated to her for that period in accordance with the formula contained in the stipulation of the parties filed on December 15, 1980, and approved by the Court on December 16, 1980.

(c) For each calendar quarter in which she did not receive a uniform cleaning allowance from March 1, 1970, until March 31, 1978, a uniform cleaning allowance in accordance with the standards as to eligibility and amount set forth in Paragraph 3(d) of the Final Judgment.

5. BACKPAY FOR CERTAIN SPECIFIED INDIVIDUALS—

(a) *Inconsistent Elections*—Certain individuals filed inconsistent elections with the Court as to the status they wished to occupy *vis-a-vis* this lawsuit. By order dated July 6, 1981, the Court determined the period(s) during which each of these individuals was to be treated as an Equal Pay Act plaintiff and/or Title VII plaintiff. The backpay that the Company is to pay to each of these individuals has been awarded on the basis of the formulae set forth in Pars. 2, 3, and 4, *supra*, but within the recovery periods established in the Order dated July 6, 1981.

(b) *"Window Period"*—Certain individuals who were not employed by the Company at any time on or after January 29, 1970 have been determined by the Court to be eligible for full or partial Title VII backpay by reason of detrimental reliance on certain class notices. By Order dated February 17, 1982, the Court determined which such individuals

are eligible for Title VII backpay, and specified for each whether eligibility is for full backpay or a percentage thereof. The backpay that the Company is to pay to each of these individuals whom the Court has determined to be eligible for full Title VII backpay has been awarded on the basis of the formulae set forth in Par. 4, *supra*. The backpay that the Company is to pay for each of these individuals whom the Court has determined to be eligible for only partial Title VII backpay has been awarded on the basis of the formulae set forth in Par. 4, *supra*, multiplied by the percentage specified for that individual in the Order dated February 17, 1982.

6. BACKPAY FOR PERIODS OF WEIGHT SUSPENSION—The backpay that the Company is to pay to each Title VII plaintiff for salary lost by reason of a suspension (grounding) on account of weight has been calculated in accordance with the stipulation of the parties filed on October 31, 1981, and approved by the Court on November 4, 1981, and is to be paid to each "Title VII suspension plaintiff" who is identified in the stipulation of the parties regarding weight suspension claims filed on February 17, 1982, and approved by the Court on February 17, 1982, for the periods of time specified herein, less the amounts of mitigation set forth therein.

7. LIQUIDATED DAMAGES—The Company is to pay to each Equal Pay Act plaintiff an additional amount equal to the backpay ordered in Paragraph 2 (and in Paragraph 5(a) insofar as awarded under the Equal Pay Act) as liquidated damages, pursuant to Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b).

8. PREJUDGMENT INTEREST—With respect to all amounts to be paid under Paragraphs 3, 4, 5, and 6 (except amounts under Paragraph 5(a) awarded under the Equal Pay Act), the Company is to pay six percent interest per annum from the date amounts would have been paid (or in the case of the lodging backpay, from the 15th of the month

to which the amount is attributable), through the date upon which the Final Judgment is entered. With respect to all amounts to be paid under Paragraphs 2 and 5(a) to which liquidated damages is added, the Company is to pay prejudgment interest only if, and only to the extent that, prejudgment interest calculated in accordance with this Paragraph 8 would exceed liquidated damages.

9. POST-JUDGMENT INTEREST—With respect to all amounts awarded under Paragraphs 2, 3, 4, 5 and 6, the Company is to pay post-judgment interest, from the date of entry of the Final Judgment to the date of payment of said amounts to the eligible recipients, calculated in accordance with the statutes in effect at the time final judgment is entered.

10. REQUIREMENTS OF NOTICE AND FILING OF CLAIM—

(a) Not less than 30 days or more than 60 days after entry of the Final Judgment, the Company shall mail by first-class mail a copy of the Notice, Description of Lawsuit and Proof of Claim, attached to this Order as Exhibits 1, 2, and 3, respectively, together with a pre-addressed return envelope, to the last known address of each person listed on Appendix A to the Final Judgment who is at that time not on the payroll of the Company. Not less than 30 days or more than 60 days after entry of the Final Judgment, the Company shall hand-deliver a copy of those documents to each person listed on Appendix A who is at that time on its payroll, and secure from each such person written acknowledgement of receipt of the documents.

(b) Not less than 75 days or more than 90 days after the entry of the Final Judgment, the Company shall cause a notice of the judgment and of the eligibility to file a claim for backpay, in the form attached to this Order as Exhibit 4, to be published in the legal notices section of the

newspaper of largest general circulation in the Minneapolis-St. Paul, Minnesota, metropolitan area and of the newspaper of largest general circulation in the Seattle, Washington, metropolitan area.

(c) If there are any persons entitled to hand-delivery pursuant to Paragraph 10(a) to whom the Company is unable to make hand-delivery within 30 days after attempting to do so, the Company shall mail the Notice and accompanying documents to the last home address of each such person shown on the Company's personnel records.

(d) Within ninety (90) days after completion of the mailing and hand-delivery, pursuant to Paragraphs 10(a) and (c), *supra*, the Company shall file a certificate attesting to completion of the mailing and hand-delivery, identifying the persons on Appendix A to whom the documents were mailed, and those upon whom hand-delivery was effected.

(e) Within 120 days after completion of the mailing and hand-delivery, the Company shall compile and provide to counsel for plaintiffs a list of each person listed on Appendix A who has not filed a Proof of Claim. The Company shall mail to each person on that list a second copy of the Notice, Desription of Lawsuit, and Proof of Claim, by certified mail, return-receipt requested, at the last home address shown on the Company's personnel records.

(f) Sixty (60) days after the second mailing pursuant to Paragraph 10(e), *supra*, the Company shall compile and provide to counsel for plaintiffs a list identifying:

(i) each person who has received the second mailing (according to Postal Service confirmations) but who has not yet submitted a Proof of Claim, and the address to which each such Notice was mailed; and

(ii) each person who was mailed the second Notice but for whom the Company has not received Postal Service confirmation of delivery and who has not yet submitted a Proof of Claim, together with

(a) the date upon which each such Notice was mailed;

(b) the addresses to which each such Notice was mailed; and

(c) such information as has been received from the Postal Service respecting efforts to deliver the Notice.

Counsel for plaintiffs may, in their sole discretion, take such further steps as they consider reasonable in the circumstances, including requesting the forwarding of such notices by governmental authorities, to provide further notice to the persons identified in (ii). The Company shall cooperate in the conduct of such efforts, and shall initially pay all expenses incurred in such efforts, subject to limitation and recoupment as follows: (1) In no event shall the Company be responsible for expenditures in connection with such efforts in excess of an aggregate amount of $25,000. (2) Any person covered by this Paragraph 10(f) who ultimately submits a claim following the expenditure of money by the Company pursuant to this Paragraph 10(f) shall have the amount of the Company's expenditure respecting her deducted from the amount otherwise payable to her.

(g) The Company shall not become obligated to pay backpay until a person entitled to do so submits a claim form in compliance with the procedures set forth in this Paragraph 10. In the case of any person for whom there is evidence of actual receipt of the Notice, Description of Lawsuit, and Proof of Claim (in the form of a Postal Service confirmation of personal delivery or a written acknowledgement of hand-delivery), entitlement to seek payment under the Final Judgment shall expire if a Proof of Claim is not mailed (or hand-delivered to the Company) within 9 months after the date of such actual receipt. In the case of any person for whom there is no such evidence of actual receipt, the entitlement to seek payment under the Final

Judgment shall expire if a Proof of Claim is not mailed (or hand-delivered to the Company) within 2 years of the date of the mailing provided for in Paragraph 10(e).

(h) In the case of any person who submits a claim form which the Company believes to be deficient, the Company shall promptly notify that person (certified mail, return-receipt requested) of the deficiency and provide an opportunity to correct the deficiency. Simultaneously the Company shall provide counsel for plaintiffs with (i) the identity of the person, (ii) the nature of the deficiency, and (iii) the address of the person involved. Counsel for plaintiffs shall be free to communicate with each such person to assist her in correcting the deficiency, and expenditures incurred in making such communication shall be reimbursed by the Company but deducted from the amount otherwise payable to the person. Notwithstanding the provisions of Paragraph 10(g), *supra*, the entitlement of a person who has submitted a defective claim form to properly claim payment under the Final Judgment shall not expire (if it would otherwise expire) until 90 days following actual receipt confirmed by the Postal Service of the Company's mailed notice of deficiency.

(i) In the case of any person who files a motion to amend judgment on the ground that the amount due her has been improperly determined, the Clerk shall mail a copy of the Court's order disposing of the motion to the movant or her individually retained counsel, and the movant's entitlement to claim payment under the Final Judgment shall not expire (if it would otherwise expire) until 90 days following the Clerk's mailing of the aforesaid order to the movant.

11. MECHANICS FOR PAYMENT—At the end of the month following receipt by the Company of a non-deficient Proof of Claim, the Company shall mail a check, postage prepaid, certified return-receipt requested, to the claimant in the amount listed in Appendix A plus post-judgment interest, less appropriate tax withholding. (In the case of

those who are current employees hand-delivery rather than mailing shall be used to deliver checks). Within 15 days thereafter, the Company shall file and serve upon plaintiffs' counsel a certification that payment has been made, and the amount thereof. The Company shall notify plaintiffs' counsel whenever, after 60 days have elapsed following the mailing of a check, the check has not been cashed, and the Company has not received Postal Service confirmation that the check was received.

12. EFFECT OF APPEAL—The filing of a Notice of Appeal and posting of a supersedeas bond by the Company in an amount approved by the Court shall stay the time for commencement of the procedures prescribed in Paragraph 10 until the return of the mandate to this Court following final disposition of the appeal (i.e. the date the mandate is received by this Court shall be substituted for the date of entry of Final Judgment in implementing the procedures prescribed in Paragraph 10).

Dated: November 30, 1982

/s/ AUBREY E. ROBINSON, JR.
United States District Judge

EXHIBIT 1 TO APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
November 30, 1982

Civil Action
No. 2111-70

MARY PAT LAFFEY, *et al.*,

Plaintiffs,

v.

NORTHWEST AIRLINES, INC.,

Defendant.

NOTICE OF AWARD OF BACKPAY

THIS COURT HAS DETERMINED THAT YOU ARE ENTITLED TO THE AMOUNTS LISTED ON THE ATTACHED COMPUTER PRINTOUT, PLUS POST-JUDGMENT INTEREST, AS BACKPAY FROM NORTHWEST AIRLINES. READ THIS NOTICE CAREFULLY. IN ORDER TO CLAIM THE AMOUNT DUE, IT IS NECESSARY THAT YOU COMPLY WITH THE PROCEDURES AND TIME LIMIT SET OUT IN THIS NOTICE.*

Enclosed with this notice are:

(1) A "Proof of Claim" that you must fill out, have notarized, and return to Northwest Airlines (in the enclosed self-addressed envelope, *return receipt requested*) in order to receive the amounts due you.

(2) A "Description of the *Laffey* Lawsuit" which explains the backpay award and the way in which the amounts due

*Required tax withholding must be made, so that the amount of the check you are entitled to receive will likely be less than the total amount awarded to you.

you were computed.

I. PROCEDURE FOR APPLYING FOR RECOVERY OF BACKPAY IN THIS CASE

To claim the money due you, you must take the following steps:

(1) You must accurately complete and sign the enclosed Proof of Claim. (You should note that the Proof of Claim *must* be notarized.)

(2) You must fill out the enclosed W-4 form.

(3) You must mail the completed Proof of Claim and W-4 form, certified mail, return receipt requested, to:

Director of Payroll & Benefits
Northwest Airlines, Inc.
Minneapolis-St. Paul International Airport
Minneapolis, MN 55111

(A pre-addressed envelope is provided, which you should use for this purpose.)

IF YOU DO NOT COMPLETE AND MAIL THE PROOF OF CLAIM FORM AND W-4 FORM WITHIN NINE MONTHS FOLLOWING RECEIPT OF THIS NOTICE, YOUR RIGHT TO ANY MONETARY RECOVERY WILL LAPSE AND YOU WILL HAVE NO FURTHER MONETARY CLAIMS AGAINST NORTHWEST AIRLINES, INC., ARISING OUT OF THE DETERMINATIONS MADE IN THIS LAWSUIT.

Once your Proof of Claim form and W-4 form are received, Northwest Airlines, Inc. will have the right to review them to assure that they are completed properly. If they are, Northwest will mail you a check by the end of the following month. If you fail to complete properly either the Proof of Claim form or the W-4 form, you will be notified of the defect and given an opportunity to correct it; however, a delay in your receipt of your check is likely to result.

The termination of this lawsuit has the legal effect of precluding you from later raising any claims that were raised by you, or on your behalf, in *Laffey v. Northwest Airlines, Inc.*, Civil Action No. 2111-70. Moreover, Northwest will be free to contend that termination of this lawsuit also has the legal effect of precluding you from raising certain other claims that could have been raised by you, or on your behalf, in *Laffey*—a contention whose validity this Court has not determined, but that would be decided by the Court before whom you asserted a claim that Northwest contended was precluded by *Laffey*. If you accept Northwest's check you may not later dispute the amount paid to you in satisfaction of this judgment.

II. PROCEDURE FOR DISPUTING THE AMOUNT OF MONEY DUE TO YOU

The amount of money due each cabin attendant has been carefully computed and has been checked by experts selected by counsel for the cabin attendants. Accordingly, it is very unlikely that a mistake has been made in determining the amount of money due to you.

The enclosed "Description of the *Laffey* Lawsuit" explains the way in which the amounts were computed for each cabin attendant. If, after reading the enclosed "Description," you still believe that a mistake has been made in your case, you should promptly take the following steps:

(1) First, you should call or write to the attorneys for the plaintiff class. They are responsible for protecting your interests. If you are going to write, address the letter to:

Michael H. Gottesman, Esquire
Bredhoff & Kaiser
Suite 1300
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

If you are going to call, the telephone number is (202) 833-9340. If Mr. Gottesman is not available, tell the person answering the call that you are inquiring about the *Laffey* case, and you will be referred to someone who can help you.

(2) If, after conferring with the attorneys for the plaintiff class, you remain dissatisfied with the amount that has been determined to be due you, do not fill out the "Proof of Claim." Instead, write a letter to the Court, at the address listed below, explaining the basis for your belief that the amount has been improperly calculated. At the top of your letter put the following words in large type: "*MOTION TO AMEND JUDGMENT IN THE LAFFEY CASE (Civil No.* 2111-70)." Also, write these words on the lower left hand side of the envelope. This letter should be addressed as follows:

Clerk of the Court
United States District Court
for the District of Columbia
United States Courthouse
Third Street and Constitution Avenue, N.W.
Washington, D.C. 20001

The Court will then decide what action should be taken in your case. Contesting the amount that has been determined to be due to you will likely delay substantially the time when you will receive payment.

III. REQUESTS FOR FURTHER INFORMATION

If you have any questions about the disposition of your application or about the completion of the proof of claim form, you may contact the attorneys for the class:

Michael H. Gottesman, Esquire
Bredhoff & Kaiser
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

If you phone and Mr. Gottesman is not available, ask for "someone who can help me in the *Laffey* case."

Date: November 30, 1982

/s/ JAMES F. DAVEY
Clerk, United States District Court for the District of Columbia

EXHIBIT 2 TO APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
November 30, 1982

Civil Action
No. 2111-70

MARY PAT LAFFEY, *et al.*,

Plaintiffs,

v.

NORTHWEST AIRLINES, INC.,

Defendant.

DESCRIPTION OF THE LAFFEY LAWSUIT

I. PURPOSE OF THIS DESCRIPTION

This description is furnished so that you will understand why you have been determined to be due backpay in the *Laffey* lawsuit, and how the amount due you was computed.

II. HISTORY OF THE LAWSUIT

In July 1970, forty stewardesses employed by Northwest Airlines, Inc. filed a lawsuit in this Court on their own behalf and on behalf of other stewardesses employed by Northwest Airlines, Inc. These plaintiffs alleged that they and other stewardesses similarly situated had been discriminated against by their employer on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964 (hereinafter called "Title VII") and the Equal Pay Act of 1963.

On February 11, 1971, this Court ruled that this law suit is a proper class action. In 1971 and 1972 notices were sent to prospective class members advising them of their rights to remain Title VII class members or to exclude themselves from from the class and/or to become Equal Pay Act plaintiffs.

In December 1972 and January 1973, the trial of this case took place. Following the trial, in November 1973, this Court ruled that the Company had discriminated against stewardesses on the basis of sex in several respects, including: paying stewardesses less than pursers; furnishing stewardesses double rooms on layovers while providing men with single rooms; discriminating against women in filling purser vacancies; providing uniform cleaning allowances to male cabin attendants but not stewardesses; and imposing more severe weight restrictions on stewardesses than on male cabin attendants.

As a remedy for the violations, the Court entered an injunction to restrain the Company from engaging in discriminatory practices in the future. The Court also ruled that the named plaintiffs and members of the class they represented would be entitled to an award of backpay, to be calculated individually for each eligible person. The purpose of the backpay was to compensate for (1) the difference in purser pay and stewardess pay, (2) the difference in the value of a shared double room and the value of a single room, (3) the loss of pay caused by weight suspensions and (4) uniform cleaning allowances that had not been paid.

On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the findings of violations, the provision of injunctive relief, and the directions for individually calculated backpay awards. The court also modified certain aspects of the decree and remanded the case to this Court for the resolution of certain outstanding issues and for implementation of the decision. Those proceedings following remand have now been completed.

If you wish to examine the opinions, orders, and judgments of the courts that have ruled on this case, you can do so by visiting the office of:

Clerk of the Court
United States District Court
For the District of Columbia
United States Court House
Third Street and Constitution Avenue, N.W.
Washington, D.C. 20001

In addition, you may contact the attorneys for the class as to any matter you wish concerning the lawsuit or this notice. Their address is:

Michael H. Gottesman, Esquire
Bredhoff & Kaiser
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

If you phone and Mr. Gottesman is not available, ask for "someone who can help me in the *Laffey* case."

III. HOW THE MONEY DUE YOU WAS COMPUTED

Each stewardess who is receiving a notice has been found eligible for some amount of backpay. The amount of each award will necessarily vary from person to person, depending upon the facts of each situation.

The categories of backpay that have been awarded are the following:

(1) Purser/Stewardess Pay Differential: For each month between April 29, 1967 and January 31, 1976, in which you received a salary from Northwest for service as a stewardess, you have been awarded an amount based upon the difference between the salary you were actually paid (including base pay, foreign flying supplement, if any, and incentive pay, if any) and the salary that would have been paid to you if you had been compensated as a purser with the level of longevity to which the Court has determined you are entitled for this purpose.

(2) Layover Accommodations: You have been awarded money for layovers between April 29, 1967, and March 6, 1978, on which you were given a double room rather than a single room. This award is based upon a formula, which has been approved by the Court, that allocates a portion of a certain sum of money to eligible claimants on the basis of the numbers of hours and minutes credited to such claimants during each period in relation to the number of hours and minutes credited to all female cabin attendants during the same period.

(3) Uniform Cleaning Allowance: For each calendar quarter for which you did not receive a uniform cleaning allowance between March 1, 1970, and March 31, 1978, you have been awarded a uniform cleaning allowance of $13.00 per quarter; provided that each quarter's award has been prorated on the basis of the time during such quarter that you were on the payroll as a stewardess; and provided further, that in order to be eligible for a uniform cleaning allowance for a particular quarter, you must have been employed as a stewardess on the first day of that quarter and you must have been so employed for the last full calendar month preceding such first day of the quarter.

(4) Weight Suspension: If you were suspended because of weight at any time after April 29, 1967, you have been awarded backpay in the amount of salary that you lost, less any outside earnings on other jobs that you took during the suspension because you were not working for Northwest. All claims for backpay on account of weight suspension have been resolved through special proceedings.

(5) Liquidated Damages and Interest: You are entitled to receive liquidated damages in this lawsuit (a doubling of your backpay) only if you filed a formal consent to be a party to this lawsuit on or before November 6, 1972, and you were employed as a stewardess with Northwest at any time during the three years prior to the filing of your consent. Where liquidated damages have been awarded,

interest is *not* awarded. For all backpay on which liquidated damages has *not* been awarded, interest has been awarded at the rate of 6% per annum (not compounded), from the date of the violation being remedied to the date Final Judgment was entered in this case (November 30, 1982). In addition, when the backpay check is issued, post-judgment interest as directed by the Court will be added for the period from December 1, 1982 to the date the check is issued.

DATED: November 30, 1982

/s/ AUBREY E. ROBINSON, JR.
Judge, United States District
Court for the District
of Columbia

EXHIBIT 3 TO APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
November 30, 1982

Civil Action
No. 2111-70

MARY PAT LAFFEY, *et al.*,

Plaintiffs,

v.

NORTHWEST AIRLINES, INC.,

Defendant.

State of _____
County of _____

PROOF OF CLAIM
OF

_____
(Type or Print Name
of Claimant)

In accordance with the Notice of Award of Backpay in the above-captioned case, I, _____, hereby claim payment of the amount that has been determined to be due to me.

The following information is submitted in support of my claim.

I. IDENTIFYING INFORMATION

1. My current address and telephone number are:

_____

_____

2. My social security number is _____.

3. I was employed as a stewardess (also known as cabin attendant or flight attendant) for Northwest Airlines during the following time-period (if you are not certain of the

dates, give your best recollection and indicate that it is an estimate):

FROM: _____
TO: _____

4. While I was employed at Northwest, I was known by the following names: _____

5. My employee clock number at Northwest was/is (if known): _____

6. Address to which check should be mailed (if same as 1, simply write "SAME"): _____

II. CLAIM BY A THIRD PARTY

[Do not fill out Part II if you are claiming on your own behalf; instead, proceed to Part III.]

If you are completing this Proof of Claim on behalf of a person other than yourself, fill out the appropriate paragraph below. *You must attach written proof of your authority to complete and execute this Proof of Claim on behalf of such claimant.*

1. Executors or Administrators: _____
I (we) am (are) _____
the duly appointed executor(s) (administrator[s]) of the Estate of _____, deceased, and my (our) mailing address is _____

2. Other:
[Give full particulars, including name, address, the identity of the person on whose behalf you are acting, and the basis for your entitlement to submit a claim on that person's behalf.]

_____
_____
_____

III. SATISFACTION OF JUDGMENT

I understand that, upon payment of the amounts found due to me, Northwest may withhold from the total backpay calculated for me the required withholding amounts for federal, state, and local income tax purposes and for other applicable taxes. I have read the Notice of Award of Backpay and under stand that the termination of this litigation and my acceptance of the amount tendered in satisfaction of my claims has certain preclusive legal effects.

SIGNED: _____
(Signature of Claimant)

ACKNOWLEDGEMENT

On this ___ day of _____, 19___, there appeared before me _____, who is personally known to me to be the individual identified in the foregoing Proof of Claim. She acknowledged, after being duly sworn, that she read the Proof of Claim, that she knows the contents thereof, that the information contained therein is true to the best of her information and belief, and she executed this Proof of Claim.

_____
NOTARY PUBLIC

My Commission expires: _____.

EXHIBIT 4 TO APPENDIX K

Proposed Legal Notice To Be Published
In Minneapolis-St. Paul And Seattle Newspapers

LEGAL NOTICE

TO WOMEN WHO WORKED FOR NORTHWEST AIRLINES, INC. AS IN-FLIGHT CABIN ATTENDANTS AT ANY TIME BETWEEN JANUARY 29, 1970 AND MARCH 31, 1978. THIS NOTICE CONCERNS YOUR POSSIBLE ENTITLEMENT TO AN AWARD OF MONEY.

The United States District Court for the District of Columbia has held, in Civil Action No. 2111-70, *Mary P. Laffey, et al., Plaintiffs, v. Northwest Airlines Inc., Defendant,* that Northwest Airlines violated the Equal Pay Act and Title VII of the Civil Rights Act of 1964 by engaging in several employment practices that discriminated on the basis of sex, *e.g.* paying female cabin attendants less than pursers, providing double rooms to female cabin attendants on layovers, failing to pay a uniform cleaning allowance to female cabin attendants, and imposing more severe weight restrictions on female cabin attendants. The court has ruled that members of the class represented by the plaintiffs are entitled to awards of backpay to compensate them for these violations. In order to receive her backpay, however, a class member must file the proper claim form within the time limits specified below.

The amounts due to each class member have been determined. The court has directed Northwest Airlines to mail a Notice, Description of Lawsuit, and Proof of Claim form to each class member who is entitled to backpay. Because of the long period of time covered in the court's order it is anticipated that some of these notices will be undeliverable. The purpose of that Notice is to inform eligible class members of the amount due them and the

procedure for claiming it in the event they do not receive the mailed notices.

IF YOU ARE A FORMER NORTHWEST AIRLINES FEMALE CABIN ATTENDANT WHO HAS NOT RECEIVED A NOTICE OF AWARD OF BACKPAY BY MAIL, AND IF YOU FALL WITHIN ONE OF THE FOLLOWING CATEGORIES:

1. YOU WERE EMPLOYED BY NORTHWEST BETWEEN JANUARY 29, 1970, AND MARCH 31, 1978; OR

2. YOU FILED A CONSENT TO BE A PARTY TO THIS LITIGATION AND WERE EMPLOYED BY NORTHWEST AT SOME POINT DURING THE THREE YEARS PRECEDING THE FILING OF THAT CONSENT; OR

3. YOUR EMPLOYMENT WITH NORTHWEST TERMINATED ON OR BEFORE JANUARY 28, 1970, AND YOUR CLAIM FOR INCLUSION IN THE TITLE VII CLASS HAS BEEN APPROVED BY THE COURT;

YOU SHOULD WRITE TO THE ATTORNEY FOR THE PLAINTIFF CLASS:

MICHAEL H. GOTTESMAN, ESQUIRE
BREDHOFF & KAISER
1000 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036

GIVING YOUR PRESENT ADDRESS AND THE NAME UNDER WHICH YOU WERE EMPLOYED BY NORTHWEST AIRLINES SO THAT AN INDIVIDUAL NOTICE MAY BE MAILED TO YOU.

Under the Court's order you must submit a Proof of Claim in order to receive the money due to you not later than _____,* or nine months following your actual receipt of a mailed Notice of Award of Backpay, whichever is sooner. Any potential claim that is not filed within that time limit will be extinguished.

*Shortly before publication, the parties are to insert the proper date, derived from Par. 10 of the Order dated Nov. 30, 1982.

APPENDIX L
FINAL JUDGEMENT OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
November 30, 1982

Civil Action
No. 2111-70

MARY PAT LAFFEY, *et al.*,

Plaintiffs,

v.

NORTHWEST AIRLINES, INC.,

Defendant.

FINAL JUDGMENT

The Court having found that the Defendant, Northwest Airlines, Inc., violated the Equal Pay Act of 1963, 29 U.S.C., § 206(d) (1), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, in the respects enumerated in 366 F. Supp. 763; and the parties having heretofore settled with the approval of the Court the entitlement of weight terminatees to reinstatement and/or backpay pursuant to Paragraphs 9(d) and 10 of this Court's Order of April 3, 1974 so that that subject need not be dealt with in a final judgment; and the Supreme Court's decision in *White v. New Hampshire Dept. of Employment Security*, 50 U.S.L.W. 4225, having made clear that it is not necessary to await the determination of the amounts owed for attorney's fees and litigation expenses before entering final judgment respecting all other matters; and the parties having completed all acts necessary to the entry of final judgment on all matters except attorney's fees and litigation expenses in accordance with prior orders of the court and of the court of appeals; it is by the Court this 30th day of November, 1982, Ordered, Adjudged, and Decreed as follows:

1. DEFINITIONS—For purposes of this Final Judgment, the following definitions shall apply:

(a) The term "Company" refers to Northwest Airlines, Inc., and any successor.

(b) The term "cabin attendant(s)" refers, collectively, to all American-based employees of the Company whose principal duties consist of providing in-flight cabin service, whether denominated stewardess, purser, flight service attendant, steward or otherwise.

2. GENERAL INJUNCTION—The Company and its officers, agents, employees, successors and all persons or organizations in active concert or participation with it, hereby are permanently enjoined and restrained from discriminating on the basis of sex in any aspect of employment of cabin attendants and from failing or refusing to implement, or to participate and cooperate in the implementation of, the provisions set forth in the body of this Final Judgment and in such Orders as are not superseded by the provisions of this Final Judgment.

3. EQUALIZATION OF WAGES—

(a) Salary: The Company shall not, contrary to 29 U.S.C. § 206(d)(1) or 42 U.S.C. § 2000(e)-2(a) and (h), discriminate on the basis of sex between cabin attendants by paying wages to cabin attendants at a rate less than the rate at which it pays wages to cabin attendants of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions.

(b) Pensions: Any pension payment hereinafter made to any female cabin attendant shall be computed as though said female cabin attendant had been classified and paid as a purser from July 2, 1965 (June 18, 1964, in the case of persons who are "Equal Pay Act plaintiffs" under ¶2(d) of this Court's Order of April 3, 1974), or the date of her first

service as a cabin attendant, whichever is later, through January 31, 1976, or the date she ceased being paid as a cabin attendant, whichever is earlier.

(c) Lodging: The Company shall furnish single rooms to all female cabin attendants on layovers. Such single rooms shall not be inferior in quality to the single rooms provided prior to April 3, 1974, to male cabin attendants.

(d) Uniform Cleaning Allowance: The Company shall provide a quarterly uniform cleaning allowance to each female cabin attendant in accordance with the following standards as to eligibility and amount:

(i) Eligibility: To be eligible for a uniform cleaning allowance in a particular calendar quarter, she must have been employed as a cabin attendant on the first day of that quarter and she must have been so employed for the last full calendar month preceding such first day of the quarter.

(ii) Amount: The amount of the uniform cleaning allowance in each quarter shall be $13 prorated on the basis of the time on payroll as a cabin attendant in such quarter.

4. MONETARY RELIEF—The Company shall pay backpay, pre-judgment interest and/or liquidated damages to each person listed in the document entitled "Appendix A to Final Judgment," which has been filed with the Clerk and is incorporated herein by reference, in the amount specified therein, plus such post-judgment interest as accrues hereafter in accordance with Paragraph 9 of the Order Respecting Computation of Backpay and Implementation of Final Judgment, filed this date, provided that a person's entitlement to payment shall expire if a claim is not made therefor in accordance with the time limits specified in Paragraphs 10(g), (h), and (i) of that Order.

5. SICK LEAVE REMEDY FOR WEIGHT SUSPENSIONS—The persons listed in Appndix B to this Final Judgment shall have their amount of sick leave increased

by the amounts specified therein without regard to any limitation on the maximum accrual of sick leave that might otherwise apply.

6. EYEGLASSES—The Company shall not:

(a) Forbid female cabin attendants to wear eyeglasses in flight;

(b) Condition the employment of female cabin attendants upon their agreeing that they will not wear eyeglasses in flight;

(c) Discriminate in hiring female cabin attendants on the basis of whether they wear eyeglasses and/or would wear eyeglasses in flight.

7. HEIGHT—The Company shall not refuse to hire female cabin attendants because of their height, if they are not taller than the Company has considered acceptable in hiring male cabin attendants at any time on or after July 2, 1965.

8. LUGGAGE—The Company shall not restrict its female cabin attendants' choice of luggage to be carried onto the plane, except that it may require that such luggage be in good condition and not of a size which would pose storage problems on the plane.

9. CHAIN OF COMMAND—The Company shall not establish a chain of command aboard a flight which makes a female cabin attendant subordinate to a male cabin attendant with lesser system seniority, irrespective of their job titles; provided that if the Company establishes a supervisory cabin attendant position, eligibility for the position shall be determined without consideration of sex, and the provisions of Paragraph 10, *infra*, shall be applicable to the filling of such position.

10. INJUNCTION AGAINST FUTURE DISCRIMINATION IN THE FILLING OF CABIN ATTENDANT POSI-

TIONS—The Company shall not discriminate on the basis of sex in the filling of cabin attendant positions, irrespective of the title of the position and the job content thereof, unless sex constitutes a bona fide occupational qualification for the position within the meaning of 42 U.S.C. § 2000e-2(e)(1), nor shall the Company perpetuate the effects of past discrimination by according a preference to persons formerly classified as pursers not warranted by system seniority in the filling of any cabin attendant position which may hereinafter be created.

11. SUPERSEDING EFFECT OF FINAL JUDGMENT—The provisions of this Final Judgment shall supersede all prior Orders in this case, except the Order of October 20, 1981 pertaining to institution of a non-discriminatory weight program, Paragraphs 22 and 23 of the Order of April 3, 1974, pertaining to litigation expenses and attorney's fees, and those Orders pertinent to the interpretation and/or implementation of this Final Judgment.

12. RETAINED JURISDICTION—The Court retains jurisdiction for the purpose of issuing any additional orders or decrees needed to effectuate, clarify, or enforce the full purpose and intent of this Final Judgment.

13. TERMINATION OF INJUNCTION—The injunctive provisions of this Final Judgment, and of all Orders not superseded by this Final Judgment, shall expire and be of no further force and effect 3 years from the date of entry of this Final Judgment (or, if any of those provisions is stayed pending appeal, 3 years from the date such stay expires), unless prior to expiration plaintiffs move for an extension and show good cause based upon actions of the Company subsequent to the entry of this Final Judgment that an extension should be granted.

/s/ AUBREY E. ROBINSON, JR.
United States District Judge

APPENDIX M
ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
January 20, 1983

Civil Action
No. 2111-70

MARY PAT LAFFEY, *et al.*,

Plaintiffs,

v.

NORTHWEST AIRLINES, INC.,

Defendant.

ORDER

Upon consideration of defendant's Motion to amend Findings of Fact, the Memoranda of law filed by Plaintiffs and Defendant, and it appearing that the Motion is both unwarranted and an improper motion under Rule 52(b), it is by the Court this 20th day of January, 1983,

ORDERED that the Motion is DENIED.

/s/ AUBREY E. ROBINSON, JR.
Chief Judge

APPENDIX N
JUDGMENT OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED
July 20, 1984

Civil Action No. 70-2111

No. 83-1033

MARY PAT LAFFEY, *et al.*,

v.

NORTHWEST AIRLINES, INC.,

Appellant

AIR LINE PILOTS ASSOCIATION,

Non-Aligned Party

Civil Action No. 70-2111

No. 83-1034

MARY PAT LAFFEY, *et al.*,

Appellants

v.

NORTHWEST AIRLINES, INC.,

AIR LINE PILOTS ASSOCIATION,

Non-Aligned Party

Civil Action No. 70-2111

No. 83-1167

MARY PAT LAFFEY, *et al.*,

v.

NORTHWEST AIRLINES, INC.,

Appellant

AIR LINE PILOTS ASSOCIATION,

Non-Aligned Party

Civil Action No. 70-2111

No. 83-1168

MARY PAT LAFFEY, *et al.*,

Appellants

v.

NORTHWEST AIRLINES, INC.,

AIR LINE PILOTS ASSOCIATION,

Non-Aligned Party

APPEALS FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in these causes is hereby affirmed in part, and reversed in part, and these cases are remanded with instructions, all in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For the Court:
GEORGE A. FISHER, Clerk

Date: July 20, 1984
Opinion Per Curiam

APPENDIX O
ORDER OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED
August 28, 1984

No. 83-1033

MARY PAT LAFFEY, *et al.*,
v.
NORTHWEST AIRLINES, INC.,
Appellant

AIR LINE PILOTS ASSOCIATION,
Non-Aligned Party

And Consolidated Cases

BEFORE: Ginsburg, Bork and Starr, Circuit Judges

ORDER

On consideration of the Petition for Rehearing of Northwest Airlines, Inc., it is

ORDERED by the Court that the aforesaid Petition is denied.

Per Curiam
For the Court:
GEORGE A. FISHER, Clerk

/s/ ROBERT A. BONNER,
Chief Deputy Clerk

APPENDIX P
LIMITED MANDATE OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED
September 14, 1984

Civil Action
No. 2111-70

No. 83-1033

MARY PAT LAFFEY, *et al.*,
v.
NORTHWEST AIRLINES, INC.,
Appellant

AIR LINE PILOTS ASSOCIATION,
Non-Aligned Party

And Consolidated Cases

BEFORE: Ginsburg, Bork and Starr, Circuit Judges

ORDER

Northwest Airlines, Inc., having moved for a stay of issuance of the mandate pending the timely filing and disposition of a petition for writ of certiorari, and the parties having subsequently advised the Court by joint motion that the following disposition of NWA's motion would reasonably serve the parties' respective interests, it is hereby ORDERED that:

1. Except in the limited respect provided in Paragraph 2 below, issuance of the mandate is stayed until November 26, 1984, and, if a petition for certiorari is filed by that date, is further stayed until final disposition by the Supreme Court.

2. A limited mandate is hereby issued empowering the district court in the interim to accomplish the adjustments to the final judgment ordered in this Court's opinion of July 20, 1984. It is contemplated that pursuant to this limited mandate the parties will promptly undertake to make and audit the revised computations necessitated by this Court's opinion, will submit disputes if any respecting said computations to the district court for resolution, and will submit the revised computations to the district court when they are completed. The district court shall have jurisdiction pursuant to this limited mandate to resolve any disputes respecting such computations and to enter an appropriate order, when the revised computations have been completed, reflecting the changed amounts resulting from the adjustments ordered in this Court's opinion.

3. The limited mandate issued pursuant to Paragraph 2 above shall not terminate the effectiveness of the district court's order of February 22, 1983 respecting security of the judgment, nor shall it trigger the procedures for notification and payment of class members contained in the district court's order of November 30, 1982.

Per Curiam
For the Court:
GEORGE A. FISHER, Clerk

/s/ ROBERT A. BONNER.
Chief Deputy Clerk

APPENDIX Q
STATUTES INVOLVED

Equal Pay Act—

29 U.S.C. § 206(d), as added to the Fair Labor Standards Act by Pub. L. No. 88-38, § 3, 77 Stat. 56:

> (d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.
>
> * * *
>
> (3) For purposes of administration and enforcement, any amounts owing to an employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or upaid overtime compensation under this chapter.
>
> * * * *

Fair Labor Standards Act—

Section 16(b), 29 U.S.C. § 216(b):

> (b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime

compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

* * * *

29 U.S.C. § 251(a), as added to the Fair Labor Standards Act by the Portal to Portal Act of 1947, Pub. L. No. 80-49, § 1, 61 Stat. 84:

(a) The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated dam-

ages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

* * * *

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this chapter be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

* * * *

29 U.S.C. § 251(b), as added to the Fair Labor Standards Act by the Portal to Portal Act of 1947, Pub. L. No. 80-49, § 1, 61 Stat. 84:

(b) It is declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

* * * *

29 U.S.C. § 255(a), as added to the Fair Labor Standards Act by the Portal to Portal Act of 1947, Pub L. No. 80-49, § 6, 61 Stat. 87, as amended by Pub. L. No. 89-601, § 601(b), 80 Stat. 844 (1966):

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

* * * *

29 U.S.C. § 260, as added to the Fair Labor Standards Act by the Portal to Portal Act of 1947, Pub. L. No. 80-49, § 11, 61 Stat. 89:

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the

court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

Title VII of the Civil Rights Act of 1964—

Section 703, 42 U.S.C. § 2000e-2:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * *

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the

amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * * *

Section 706(g), 42 U.S.C. § 2000e-5(g), as amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 104:

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Office - Supreme Court, U.S.
FILED
DEC 19 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

MARY P. LAFFEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents submit that this case does not warrant review by this Court.

COUNTER-STATEMENT OF THE CASE

In its zeal to make this case appear worthy of this Court's time and attention, petitioner (hereinafter NWA) has found it necessary to put to this Court the case, not as it actually exists, but as NWA wishes it existed. The facts of this case are as set forth in the district court's extensive findings, issued in 1973 after the court had heard five weeks of testimony and had reviewed thousands of pages of exhibits; those findings take up about 55 pages of the appendix to NWA's petition (App. 161a-216a). At NWA's request, many of those findings were reviewed by the court of appeals in 1976; that court unanimously affirmed, in a careful opinion (*Laffey I*) covering 96 pages of the appendix (App. 65a-160a). (NWA sought certiorari from that opinion, which was denied in 1978 (434 U.S. 1086)). Those findings were reaffirmed in *Laffey III*, when NWA sought to challenge them again (App. 1a-63a).[1] Yet virtually every line of the "statement" in NWA's current petition is inconsistent with the facts as found below.

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[1] NWA notes in its statement that the award affirmed in *Laffey III* "totals approximately $60 million" (Pet. 2). A significant portion of that is attributable to findings of sex discrimination that NWA does not challenge in this Court: furnishing men single rooms on layovers while requiring women to share double rooms; suspending and firing women for becoming five pounds overweight, while allowing men to continue their employment even when substantially overweight; and paying for the cleaning of men's but not women's uniforms (App. 3a; see also App. 183a-185a). Additionally, the size of the backpay award is in major part a reflection of the duration of NWA's discriminatory practices (the backpay period encompassed more than eleven years, NWA not ceasing some of its discriminatory practices until eight years after suit was filed), and of NWA's success in attenuating this lawsuit (a substantial portion of the award consists of compensation for delay in receiving backpay, some of which is owing for violations committed more than 17 years ago).

In this counter-statement, we address three aspects of NWA's mischaracterization of the record: its attempt to mask the sex-segregation in its dual salary scale; its attempt to portray the work of pursers and stewardesses as different in fact; and its pretense that it paid the men and women differently for 30 years because of an innocent mistake. (We discuss other inaccuracies in NWA's statement in the pertinent sections of our argument).

1. *Sex segregation in the dual salary scale.* NWA paid salaries to its "pursers" that were 20% to 55% higher than those NWA paid to its "stewardesses" (App. 215a). NWA's Petition states that "most" pursers were men, but that the lower-paid classification (to which the women were relegated) also included "a significant number of men"—indeed, "hundreds" (Pet. 3). This supposed fact furnishes the predicate for NWA's repeated contention that it could not have been motivated by sex in maintaining the dual salary scale. But NWA's recitation is directly contrary to the findings of the district court:

> As of April 25, 1970 [four days before the EEOC charge that triggered this litigation was filed], the Company employed 137 male cabin attendants, all as pursers, and 1,747 female cabin attendants, all but one classified as stewardesses.[2]
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> * * * *
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> Between May 1, 1965 [two months prior to the effective date of Title VII], and May 1, 1970, the Company hired 118 new male cabin attendants, all of them as pursers. During the same period, it hired 2,224 new female cabin attendants, all of them as stewardesses. [App. 168a-169a].

These figures are hardly surprising, given that NWA's Director of In-Flight Services, who was responsible for the classification of cabin attendants, testified at trial

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[2] The one female who had become classified as a purser had accomplished that feat only by running an extraordinary gauntlet erected by NWA to defeat her efforts (App. 173a-176a). She was reclassified back to stewardess shortly after this suit was filed (App. 176a-177a).

that NWA "just assumed" that "males would be pursers and females would be stewardesses." (JA 766).[3]

The "hundreds of men" in the lower-paid category to whom NWA refers in its Petition were the product of actions taken by NWA after this suit was instituted, to temper the evident sexual identification in its dual salary scale. As the court below explained:

> These statistics changed significantly *after suit was filed*, when NWA began to diversify male-female ratios in different occupations. Some men were placed in the lower-paid categories by demoting pursers and by hiring new male applicants as "stewards"—who were paid at the stewardess rate. [App. 70a, n.19 (emphasis added), citing the district court's findings at App. 169a, 176a].[4]

NWA also ignores the findings below in suggesting that its restriction of the *higher*-paid classification solely to men ended in "the late 1960's" (Pet. 3, 5-6). While NWA *purported* to open the purser classification to women in 1967 (on less favorable terms then had been previously extended to men, App. 171a-173a), the reality, as found by the district court, was that from that point forward NWA discriminated rampantly against women who sought the purser classification and succeeded in keeping all but one woman from obtaining that classifi-

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[3] "JA" refers to the Joint Appendix in the court below in *Laffey I*, which was also used in *Laffey III*. We have lodged with the Clerk copies of those volumes of the Joint Appendix below that are cited herein.

[4] NWA had hired some men at an initial salary equal to the stewardess salary between 1949 and 1957—when it used a plane containing a sunken bar lounge and desired men to tend the bar (App. 164a, 168a). These men (called flight service attendants, or FSA's) were promised prompt advancement to purser salaries (App. 167a-168a). As one NWA witness testified: "we do not hire flight service attendants and leave them in limbo without becoming pursers for an indefinite period of time." (J.A. 863). Not one man was hired at the stewardess salary between 1957 (when NWA ceased using the plane with the sunken bar lounge) and the filing of this lawsuit in 1970 (App. 168a).

cation (App. 173a-182a).[5] The district court found that "[t]op Company personnel" participated in this discrimination (App. 181a-182a).

2. *Equality of work.* The description in NWA's Petition of the work done by pursers and stewardesses deviates 180° from the findings below. The district court found that pursers and stewardesses were performing equal work, and that finding was affirmed by the court of appeals. It should be evident that if the work of pursers and stewardesses were as depicted in NWA's Petition—*i.e.*, if pursers were supervisors and stewardesses their subordinates—NWA would be seeking review of the holding that men and women were doing "equal work."

To begin with, although NWA's Petition talks throughout about two separate "jobs," the district court found that there was only one job—cabin attendant—whose duties were the same whether performed by men called "pursers" or by women called "stewardesses." The number of cabin attendants assigned to a flight was a constant, regardless of whether the positions were filled by pursers or stewardesses; if a purser was assigned, there was one less stewardess (App. 195a). "Virtually all duties assigned to cabin attendants are performed by all cabin attendants, regardless of classification" (App. 196a). All performed identical functions in carrying out the three basic components of the cabin attendant job: providing service to passengers, insuring passenger safety in the event of emergencies, and promoting the company's good will among passengers (App. 196a-197a).[6] To be sure, there were minor differences in the particular duties a cabin attendant would be called upon to perform—depending, *e.g.*, on the type of plane, the length of

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[5] The fate of the one woman who became classified as a purser is described at n. 2, *supra*.

[6] We use the past tense, because in 1976, as the district court had ordered, NWA abolished the separate purser and stewardess classifications and merged them into a single "cabin attendant" classification.

the flight, the itinerary, whether a meal was to be served, whether the attendant was working in first class or coach, etc.—so that some cabin attendants were called upon to perform duties that others were not. But those extra duties were borne by both stewardesses and pursers, and did not differentiate the two (App. 197a-207a). NWA's dual salary scale compensated all pursers alike, and all stewardesses alike (at levels substantially below the pursers), regardless of the particular duties they were called upon to perform (App. 215a-216a).

NWA's depiction of supposed differences in "supervisory" responsibilities as between pursers and stewardesses is, to say the least, fanciful. Neither pursers nor stewardesses, who were represented by the same union in a single bargaining unit, had any of the duties customarily associated with supervision. They had no authority to suspend, discipline, or even warn other cabin attendants (JA 523, 526, 1073). They had no responsibility to recommend such action to their superiors (JA 526). It was the responsibility of every cabin attendant on every flight—purser and stewardess alike—to report acts of misconduct by other cabin attendants to their superiors (JA 523-524). Not once did NWA's 500-page Cabin Service Manual (JA 1559-1728), which described the cabin attendants' duties in great detail, refer to the purser or stewardess as "supervisor," and not once did it describe any of their duties as "supervisory." [7]

While the assigned duties of all cabin attendants were the same, NWA wanted the more experienced cabin attendants on the flight to help out new cabin attendants if they encountered any difficulties. To this end, NWA assigned two cabin attendants on each flight—one in the

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[7] NWA had *another* category of employees, called "inflight supervisors," who *did* perform supervisory duties: they evaluated and disciplined pursers and stewardesses, and conducted periodic "check rides" to monitor their performance. In-flight supervisors, unlike pursers and stewardesses, were not in the bargaining unit. There was, of course, no claim in this case that the duties of in-flight supervisors constituted equal work with stewardesses.

first class section (the "senior cabin attendant") and one in the tourist section (the "senior in tourist")—the function of "[m]onitoring and where necessary correcting work of other cabin attendants" (App. 209a-210a). It is this "monitoring" function that NWA has chosen in this litigation (albeit never before) to label "supervisory." But the vast majority of senior cabin attendants and senior in tourist positions were occupied by stewardesses, not pursers; and the monitoring function was the same whether the position was occupied by a purser or stewardess, as six male pursers testified, as NWA's own officials conceded in their testimony, and as the district court found (App. 208a-209a).[8]

Indeed,the district court found that in practice stewardesses serving as "senior in tourist" and "senior cabin attendant" were called upon far more often than pursers to assist and correct inexperienced cabin attendants, because "[n]ormally, all of the stewardesses on flights on which pursers are assigned are relatively senior and experienced" (App. 210a; see also, App. 98a-99a). Significantly, NWA's own contemporaneous descriptions of the duties of pursers and stewardesses never mentioned the

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[8] NWA points to the definitions of "purser" and "stewardess" in the collective bargaining agreements, and notes that only the "purser" definition referred to this function (Pet. 4). But NWA's Cabin Service Manual assigned the monitoring function to both pursers and stewardesses (App. 208a). And, in any event, it is the reality, and not inaccurate job descriptions, that controls the determination of whether men and women are performing "equal work." 29 CFR § 800.121; *E.E.O.C. v. Mercy Hosp. and Medical Center*, 709 F.2d 1195, 1197 (7th Cir. 1983); *E.E.O.C. v. Central Kansas Medical Center*, 705 F.2d 1270, 1273 (10th Cir. 1983); *Strecker v. Grand Forks Cty. Soc. Serv. Bd.*, 640 F.2d 96, 100 (8th Cir. 1980); *Gunther v. County of Washington*, 623 F.2d 1303, 1309 (9th Cir. 1980), *affirmed*, 452 U.S. 161 (1981); *Katz v. School District of Clayton, Missouri*, 557 F.2d 153, 156 (8th Cir. 1977), and cases cited therein. NWA notes that its Manual contained slightly different language in describing the pursers' and stewardesses' "accountability" as senior cabin attendants (Pet. 5), but the district court found that in fact there was no difference in accountability (App. 209a-211a).

monitoring function as a factor that distinguished pursers from stewardesses.[9]

NWA never regarded the performance of the monitoring function as relevant in determining the pay levels of either pursers or stewardesses. Pursers who consistently flew *not* as senior cabin attendant (and thus without the monitoring function) were paid the same as pursers flying constantly in that capacity, while stewardesses who regularly flew as senior cabin attendant were paid the same as those who did not (App. 98a). An expert in industrial engineering who had observed the work performed in flight and intensively studied NWA's Cabin Service Manual, disciplinary records, and pay practices, testified that the monitoring function was "insignificant" in content and had been treated as irrelevant by NWA in determining cabin attendants' pay levels (JA 618-621, 648-650, 2245). And the courts below so found (App. 102a-103a, 211a (insignificant); App. 98a, 215a-216a (treated by NWA as irrelevant for pay purposes)).

3. *NWA's motive for paying stewardesses less than pursers.* Because the precise findings of the courts below respecting NWA's motive are central to demonstrating why the first question posed in NWA's Petition is not presented here, we defer to our Argument the correction of NWA's inaccurate statements at Pet. 6-7. We note only that, as more fully established *infra* at 11-13, (1) neither the district court nor the court of appeals found or even suggested that NWA's *reason* for paying stewardesses less than pursers was a mistaken belief that they were performing different work; and (2) on the contrary, both courts expressly found that NWA was *not* motivated by perceived differences in the work of pursers and stewardesses, and that sex was in fact the motive for the dual salary scale.[10]

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[9] *E.g.*, P. Ex. 279; P. Ex. 90, p. 242; P. Ex. 91; P. Ex. 93; D. Ex. 1, App. C-5; Trial Tr. 2675-76, 2735-36.

[10] We note here certain other inaccuracies in NWA's statement of the case:

ARGUMENT

As we explain below, none of the questions in NWA's Petition warrants review by this Court.

I.

NWA does not in this Court challenge the findings of the courts below that NWA paid males more than females for performing equal work. The issue posed by NWA is whether, nevertheless, NWA should have been found to have established a *defense* to an equal pay violation: that the salary "differential [was] based on any other factor other than sex" (29 U.S.C. § 206(d)(1)(iv))—a defense which, as NWA correctly points out (Pet. 9-10), is applicable under both the Equal Pay Act and Title VII. The "factor other than sex" which NWA invokes is NWA's purported mistake in believing that there were material differences between the work of pursers and stewardesses when in fact there were not. In simple terms, NWA is asking this Court to determine whether such a mistake of fact is a "factor other than sex" and therefore a defense to an equal pay violation.

NWA's repeated suggestion that the dual salary scale was established in collective bargaining (Pet. 3, 4, 6) is false. The salary differential was created unilaterally by NWA (App. 88a). The union inherited an NWA-created *"status quo* under which pursers were more highly paid than stewardesses" (*id.*), and when the union "attempt[ed] to win better treatment for stewardesses, it encountered stiff resistance from NWA" (App. 89a). The union's failure to achieve pay equity was "not attributable to any belief" that the work of pursers and stewardesses was different (*id.*).

NWA asserts that in creating the purser classification in 1947 and treating it as different from the stewardess classification, it merely "followed the lead" of Pan Am and TWA (Pet. 4). But there is nothing in the record of this case that supports NWA's contention that it created positions whose content resembled those bearing the same titles on Pan Am or TWA, and the case NWA cites, *Maguire v. Trans World Airlines, Inc.*, 535 F.Supp. 1283 (S.D.N.Y.), *aff'd in part, rev'd and rem'd in part*, 722 F.2d 728 (2d Cir. 1983), suggests the opposite: *Maguire* states that TWA created the same dissimilar purser and stewardess positions as existed on Pam Am, 535 F. Supp. at 1288, but that the situation at NWA was "entirely different" from Pan Am and TWA in that the work of pursers and stewardesses was the same, *id.* at 1299.

In the context of this case, the question is not worthy of this Court's consideration for each of the following reasons: (1) The "factor other than sex" defense is an affirmative defense which must be properly pleaded and proved by the defendant; in this case NWA never asserted its "mistake" defense in the trial court, and indeed asserted that defense for the first time only on its third appeal in the court below—ten years after the violation had been found by the district court, and seven years after that finding had been affirmed by the court of appeals. The defense thus was waived. (2) No court has found that NWA based the wage differential at issue here on a mistaken belief that the work of pursers and stewardesses was different; indeed, the findings of the trial court, affirmed by the court of appeals, are directly to the contrary. (3) The proposed question presented does not accord with the record in another respect. In the words of the court below, "[w]here, as here, there is an actual intent to separate jobs by sex, and the employer is found in fact to have paid women less for equal work, . . . disparate treatment is solidly established" (App. 14a). (4) Even if the issue were properly presented here, it is clear that Congress did not intend a mistake of fact to be a defense to an equal pay violation, and nothing in *County of Washington v. Gunther*, 452 U.S. 161 (1981) is to the contrary. (5) There is no conflict in the circuits on the issue posed by NWA, and the issue is not one of sufficient recurrence or importance to merit this Court's plenary consideration. We briefly elaborate on these points below.

1. In *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974), the Court held that in an equal pay case "once the [plaintiff] has carried [the] burden of showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions." The "factor other than sex" exception is the fourth of the four exceptions referred to in *Corning*. In *Gunther* this Court reiterated that this exception is an "affirmative defense."

452 U.S. at 170. The Federal Rules of Civil Procedure require a defendant to plead, or else waive, an affirmative defense. Rules 8(c), 12(h). And the lower courts have consistently applied this pleading requirement to the affirmative defenses under the Equal Pay Act and, more generally, under the Fair Labor Standards Act.[11] NWA never pleaded the affirmative defense that it now asserts. Indeed, at no time before its third appeal to the court of appeals on the merits of this case—many years after the equal pay violation had been found and affirmed—did NWA contend that its purported mistaken belief that the work of pursers and stewardesses was different constituted a defense under the "factor other than sex" exception.

When NWA for the first time in the case raised this defense in the court of appeals in *Laffey III*, plaintiffs argued that NWA had for the reasons just stated waived its right to raise the issue. The court of appeals held that NWA's newly-injected defense was without legal merit, and did not address the threshold question of waiver.[12]

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[11] See, e.g., *Goodrich v. Intern. Broth. of Elec. Workers, AFL-CIO*, 712 F.2d 1488, 1491 (D.C. Cir. 1983); *Donovan v. Hamm's Drive Inn*, 661 F.2d 316, 317-18 (5th Cir. 1981); *Conklin v. Joseph C. Hofgesang Sand Co.*, 565 F.2d 405, 406-7 (6th Cir. 1977); *Brennan v. Valley Towing Co., Inc.*, 515 F.2d 100, 104 (9th Cir. 1975); *Mitchell v. Williams*, 420 F.2d 67, 68 n.2 (8th Cir. 1969), and cases cited therein; *Wirtz v. F.H. Sloan, Inc.*, 411 F.2d 56, 60 (3rd Cir. 1969), affirming, 285 F.Supp. 669, 675 (W.D. Pa. 1968).

[12] The court had followed a similar course in *Laffey I*. There, NWA attempted to belatedly inject a different "factor other than sex" defense ("foreign flying") than the one proffered in *Laffey III*. As in *Laffey III*, plaintiffs argued that NWA had waived the defense by not raising it in timely fashion. As in *Laffey III*, the court of appeals rejected the defense on the merits, without deciding the question of waiver (App. 101a-102a n.153):

> The counter-argument advanced is that the exception to the Act is an affirmative defense which NWA has waived because it was never pleaded. We need not resolve this issue, however, since even if NWA properly raised the defense, it has not shouldered its burden of proving it.

That threshold question remains, however, and is, we submit, a bar to NWA's assertion of the issue it seeks to present to this Court.

2. Precisely because NWA did not raise the defense in the trial court, neither the findings of fact nor the conclusions of law that determined NWA's liability make reference to such a defense or to the factual issues that would be pertinent thereto. Most assuredly, the trial court did *not* find, as NWA's question presented assumes, that the wage differential between pursers and stewardesses was *based on* NWA's mistaken belief that their work was different. Indeed, that court made findings of fact directly to the contrary, in the course of resolving the issues that *were* raised.

NWA's lone defense at trial was to dispute that the work of pursers and stewardesses was in fact equal. To this end, NWA asserted a number of respects in which it claimed the work was different. The district court examined each of these asserted differences and found with respect to each that: (a) in fact there was no difference between pursers and stewardesses as such, but rather some pursers and some stewardesses had certain extra duties to perform which others in each category did not (App. 197a-215a); and (b) NWA's pay practices belied the claim that these extra duties had motivated the pay disparity, for NWA did not pay pursers who performed the "extra duties" any more than pursers who did not, nor did NWA pay stewardesses who performed the "extra duties" any more than stewardesses who did not, and indeed NWA paid pursers who did *not* perform these extra duties substantially more than stewardesses who *did* perform them (App. 215a-216a). These findings established that the work differences in which NWA claims to have mistakenly believed did not motivate the pay differential. And, based on these subsidiary findings, the district court concluded that NWA "has discriminated *on the basis of sex* . . . by [p]aying female stewardesses lower salaries and pensions than male pursers." (App. 216a; emphasis added.)

The court of appeals in *Laffey I* expressly affirmed the finding that NWA had been motivated by sex in paying stewardesses less than pursers, and not by purported differences in their work. Thus, the court stated (App. 95a-97a; footnotes omitted):

> An employer must show a consistent pattern of performance of additional duties in order to demonstrate that added duties are genuinely the motivating factor for the substantially higher pay. . . .
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> . . . Where, for example, all male employees receive greater pay but only some perform the extra tasks allegedly justifying that pay, a reasonable inference is that maleness—not the added chores—is the basis for the higher wage . . . Moreover, if some women without added compensation render the same extra performance that purportedly justified the pay differential favoring men, the inference becomes even stronger that the duties are irrelevant to the wage-setting . . . . The conclusion to be drawn, when any of these inconsistent patterns exist, is that
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> > [d]espite claims to the contrary, the extra tasks were found to be makeweights. This left sex—which in this context refers to the availability of women at lower wages than men—as the one discernible reason for the wage differential. That, however, is precisely the criterion for setting wages that the Act prohibits.

In light of these principles, the court of appeals examined the numerous district court findings respecting inconsistencies between NWA's proffered explanation for the wage differential and the reality (App. 97a-99a). The court concluded that NWA would have paid cabin attendants differently than it did "if in fact the activities purportedly justifying the larger salary were really the reason for the added compensation" (App. 100a). The court stated (App. 100a; footnote omitted):

> We have pointed to the inconsistencies between occupational tasks and rewards to underscore our conviction that the District Court properly concluded that any greater duties demanded of pursers is not the foundation for their higher pay.

And, the court of appeals concluded from its review of the district court's findings that (Pet. App. 99a; footnote omitted):

> This evidence leads convincingly to the conclusion that the contrast in pay is a consequence of the historical willingness of women to accept inferior financial rewards for equivalent work—precisely the outmoded practice which the Equal Pay Act sought to eradicate.

Ignoring the basic findings in the case, NWA rests its assertion that the wage differential was found to be based on a mistaken belief that the work was different on a statement by the district court addressed to a wholly different question and lifted out of context by NWA (Pet. 6-7, 14). Five months after the district court issued its ruling that NWA had committed an equal pay violation, the court addressed the separate question whether NWA was entitled to be relieved of the obligation to pay liquidated damages. The issue then before the court was not whether the salary differential was "based on" NWA's mistaken belief in work differences (the question NWA *now* poses), but rather whether NWA's belief in the existence of such differences meant that it had reasonable grounds for a good faith belief that in not equalizing the salaries it would not violate the Equal Pay Act (see *infra* at 27-30). In the passage seized upon by NWA, the district court answered that question as follows (App. 220a-221a):

> The Defendant did have reasonable grounds for belief that it was not violating the Equal Pay Act. While this Court has found as fact that the jobs of purser and stewardess are in fact equal, it was not unreasonable for the Company to have believed otherwise. . . . The Court does not find an intentional, bad faith, attempt to evade the law. The judgment of the Company that its conduct would not be found to be in violation of the Equal Pay Act has been found to be in error.

This passage is of no benefit to NWA on the issue it *now* tenders. For a company may be motivated by sex in paying women less than men, and yet believe reasonably and in good faith that continuance of that differential will not contravene an Act that is applicable only if the jobs meet a statutory definition of "equal work." The quoted passage addressed only the latter point. There is no suggestion in the passage that, contrary to all the findings discussed above, the 20% to 55% salary differential was *based on* a mistaken belief that the work was different. And when later advised that NWA was attempting to construe the passage as establishing that proposition as well, the district court expressly rejected any such construction of its opinion:

> MR. GOTTESMAN: I just want to respond to something that recurs, and it's the company's consistent efforts to take this Court's statement that they didn't deliberately intend to violate the Equal Pay Act and try to convert that into a statement by this Court that sex had nothing to do with this pay scale.
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> THE COURT: Sex had everything to do with this pay scale.[13]

Moreover, the above liquidated damages ruling of the district court—the sole basis for NWA's claim that it was found to have been innocently motivated—was reversed in *Laffey I*. On remand, the evidentiary record on the liquidated damages issue was reopened, and the district court, on a much fuller record, reached a different conclusion than it had the first time: "Defendant has thus failed to satisfy its burden of showing good faith and reasonable grounds for believing that it was in compliance with the Equal Pay Act by paying stewardesses less than pursers" (App. 255a-256a). Among the factors on which this conclusion was based was a finding that the Company officials who thought that NWA's pay practices were in

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[13] Transcript of hearing on liquidated damages following remand (appearing in the court of appeals record as Record Document 69), at p. 106. We have lodged a copy of this transcript with the Clerk.

compliance with the Equal Pay Act knew little about the actual duties of the pursers and stewardesses and had made no effort to consult those in management who *were* knowledgeable about those duties (App. 49a-50a n.40; 253a).

The passage cited by NWA thus in no way undercuts the clear determination of both courts below (pp. 11-13, *supra*) that the salary differential was "based on" sex, not on any perceived differences in the work of pursers and stewardesses.

3. Even assuming that, contrary to the findings below, the 20% to 55% salary differential between pursers and stewardesses was based on perceived, albeit non-existent, differences in their work, still NWA would be unable to show that the differential was not based on sex. The opinion in *Laffey III* makes this point succinctly (App. 13a-14a; footnotes omitted):

> Even if we could find in *Gunther* the between-the-lines dictum NWA ascribes to the Court, NWA's argument for exoneration from equal pay liability would not suceed.
>
> The Title VII decisions NWA cites unexceptionally involve situations in which the employer did not classify jobs overtly by sex (or race). E.g., *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In that setting, where sex-based categorization, if it exists, is covert, the Court has elaborated rules for establishing discriminatory intent or the lack thereof. This case, however, involves overt sex classification—explicitly disparate treatment. Purser jobs were reserved for men only, the stewardess class was all-female. NWA has cited no case, nor do we know any, suggesting that a Title VII or Equal Pay Act plaintiff must demonstrate, beyond sex-segregated job classifications and unequal pay for equal work, the employer's evil mind, in NWA's words, "disparate treatment" that proceeds from "discriminatory animus" or a "bad-faith attempt to evade the law." NWA Brief at 14, 39.

> In sum, so far as we can tell, neither Congress nor the [Supreme] Court has ever entertained the notion that an employer who intentionally classifies jobs by sex, and in fact pays women less for the same work, can achieve exoneration by showing he sincerely thought the jobs he separated by sex were different. . . . Where, as here, there is an actual intent to separate jobs by sex, and the employer is found in fact to have paid women less for equal work, all precedent in point indicates that disparate treatment is solidly established.[14]

4. Even if NWA's first issue were properly presented here, it is clear that Congress did not intend the "factor other than sex" exception to make mistake of fact a defense to an equal pay violation.

The first three affirmative defenses under the Equal Pay Act refer to specific objective factors, aside from the duties of a job, which may legitimately justify wage differentials: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; . . ." 29 U.S.C. § 206(d)(1). Congress recognized that there were other factors similar in nature, but too numerous to identify, which could similarly justify wage differentials. The fourth affirmative defense—the "factor other than sex" defense—was meant to encompass these other factors. Thus, the House Report explained the "factor other than sex" defense as follows:

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[14] In a footnote to this passage, the court stated that in a case involving "explicitly sex-based classification" it is not necessary—in the court's words "not even relevant"—for a plaintiff to prove "[a]n employer's 'discriminatory motive' or 'desire to pay men—because they are men—more than [women received].'" (App. 14a-15a, n.12). The purport of that footnote is clear: where discrimination on the basis of sex is overt, there is no need for a plaintiff to prove that the employer's objective was adversely to affect women. That proposition is not in doubt, as the cases cited in the court's footnote establish. Nevertheless, NWA lifts the words "discriminatory motive" and "not even relevant" out of context and misleadingly includes them in its statement of questions presented.

> As it is impossible to list each and every exception, the broad general exclusion has . . . been included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training or ability would also be excluded . . . . [H.R. Rep. No. 309, 88th Cong. 1st Sess. 3, (1963). Accord: 109 Cong. Rec. 9206, 9208 (Rep. Goodell); *Id.* at 9196 (Rep. Thompson).]

What all the factors mentioned by Congress—those in the first three defenses and those referred to in connection with the fourth—have in common is that they provide a sound, objective, non-discriminatory basis for paying one job more than another. Congress did not mean to tie employers' hands as to the choice of which such factors to use.[15] But a mistake of fact by an employer as to the duties of its own employees does not share these

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[15] As this Court noted in *Gunther*, Congress, in enacting the "factor other than sex" defense, was particularly concerned about not disrupting *bona fide* job-evaluation systems. 452 U.S. at 170-171, n.11. Such systems may incorporate a wide variety of objective factors, other than sex, into the determination of how jobs should be paid. The fourth defense thus would protect use of these systems as long as each of the factors in a given system qualifies as a "factor other than sex." NWA mistakes the scope of protection afforded by the fourth defense when it asserts that "a differential resulting from a unilateral job evaluation system is automatically permissible under the Act" (Pet. 12-13). The objective factors used in a *bona fide* job evaluation system are what the Act protects, not the system *per se*. Similarly, NWA is mistaken in its effort to equate the fact that the wage rates here were agreed to in collective bargaining with a *bona fide* job evaluation system (Pet. 13). As the court of appeals in *Laffey I* stated, there is no evidence in the record that the parties to collective bargaining ever evaluated the work of pursers or stewardesses in the course of negotiating wage rates (App. 88a-89a). See also n.10, *supra*. Moreover, Congress expressly determined that wage differentials resulting from good faith collective bargaining are *not* to be exempt from the Act's prohibitions. (App. 50a & n.41; Section 4 of the Equal Pay Act (not codified), P.L. 88-38, 77 Stat. 57 (1963); see also 29 U.S.C. § 206(d)(2)).

qualities. Congress evinced no desire to protect those employers who make such mistakes from having to pay females the same wages as males for performing equal work.

NWA errs in reading this Court's decision in *Gunther* to say otherwise. NWA quotes, at Pet. 10-11, a portion of a passage from *Gunther*, 452 U.S. at 170-171, but leaves off the next two pertinent sentences:

> Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of "other factors other than sex." Under the Equal Pay Act, the courts and administrative agencies are not permitted to "substitute their judgment for the judgment of the employer . . . who [has] established and applied a bona fide job rating system," so long as it does not discriminate on the basis of sex. 109 Cong. Rec. 9209 (1963) (statement of Rep. Goodell, principal exponent of the Act). [Footnote omitted].

Read in full, the point of the *Gunther* passage is simply that Congress meant to protect the pay practices of employers who pay their employees based upon objective factors other than sex, regardless of whether those factors might unintentionally adversely affect the wages of employees of one sex as compared to the wages of employees of the other sex. Nothing in this passage suggests that where there is no such factor, but simply a mistake of fact, the fourth affirmative defense may successfully be invoked. As the *Gunther* Court put it, "The question . . . is what *wage practices* have been *affirmatively authorized* by the Equal Pay Act." 452 U.S. at 169 (emphasis added). The Act did not "affirmatively authorize" employers to pay women less than men for equal work where the difference is based on a mistake of fact.

5. NWA asserts that two decisions in other circuits have decided the issue NWA seeks to raise in a manner conflicting with the resolution below. There is no such

conflict. Neither *Plemer v. Parsons-Gilbane*, 713 F.2d 1127 (5th Cir. 1983), nor *Maxwell v. City of Tucson*, 35 FEP Cases 359 (9th Cir. 1984), even deals with the question whether a mistake of fact is a "factor other than sex." And, neither of those cases adopts any position that would conflict with the view that a mistake of fact is not such a defense. Both cases stand for the proposition that where an employer asserts an *objective* basis other than sex for a wage differential, the question remains whether the employer's proffered "factor other than sex" is a pretext and not the real reason for the wage differential.[16]

There is no indication that the first question presented by NWA is a recurring one. Certainly, it is not a matter of pressing importance in the administration of equal pay law. No reason appears why this Court should give plenary consideration to this question.

II.

The second question that NWA tenders is whether courts, upon finding an equal pay violation under Title VII, are "required" to award backpay in the amount of the difference between what the men and women received. NWA contends that they are not, and that the proper remedy is to award backpay on the basis of a hypothesized finding as to what the employer would have paid both sexes had it not maintained a dual salary scale.

As we discuss *infra* at 23 n.20, NWA's statement of the question inaccurately describes what happened here: the formula for calculating backpay in this case was entered pursuant to the remedial discretion of the district court and was not thought by that court to be

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[16] NWA's reliance on the concurring opinion of Judge Merrill in *Maxwell* is particularly puzzling. Judge Merill's opinion simply disputes the view of the other two members of the panel that the employer's asserted "factor other than sex"—an objective factor—was a pretext. See 35 FEP Cases at 359, 362, 364. In any event, the minority view of a single judge on a panel is no basis for asserting a conflict in the circuits.

"required" by law. But more importantly, NWA's question is not presented in this case, because, as the court below in *Laffey III* held, NWA waived its right to raise the question by failing to assert it in a timely fashion (App. 33a-34a):

> NWA had the opportunity to appeal any feature of the back-pay award, including the use of the full purser rates, in *Laffey I*. Therefore, NWA must be deemed to have waived any argument available at that time which it did not assert.
>
> Adherence to the rule that a party waives a "contention that could have been but was not raised on [a] prior appeal," *Munoz v. County of Imperial*, 667 F.2d 811, 817 (9th Cir.), *cert. denied*, 459 U.S. 825 (1982), is, of course, necessary to the orderly conduct of litigation.[17]

NWA does not ask this Court to review the waiver holding, and thus the decision below rests upon an independent ground that is not challenged in this Court. In any event, even if NWA *had* sought review of the waiver holding in its Petition, the court below was plainly correct in finding waiver.

Litigation over the remedial formula for curing the equal pay violation took place in early 1974. Plaintiffs proposed backpay in the amount of the difference between purser and stewardess salaries. NWA argued that *no* backpay should be awarded, but did not dispute that

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[17] Preliminary to so holding, the court below evaluated NWA's claim that there was an intervening change in the law that justified the belated injection of this issue into the case, and concluded that there was no such change: the legal principle that NWA contends is *now* the law—that Title VII victims should not be placed "in a better position than they would have been in if the alleged discrimination had not occurred" (App. 30a)—was already established as the law at the time that NWA was originally called upon to state its position respecting the appropriate backpay formula (App. 31a). The court further observed that even had the principle not been already established at that time, nothing would have foreclosed NWA from advancing the point, and thus subsequent judicial endorsement of the principle upon which NWA now relies would not excuse NWA's failure to have raised it before (App. 33a, n.28).

if backpay was to be awarded it should be in the amount of the difference; indeed, NWA's own back-up position contemplated that backpay would be calculated in that manner.[18] The district court's remedial order, which it converted into a judgment in mid-1974, thus reflected the positions of both sides that if backpay was to be awarded it should be measured by the difference between purser and stewardess salaries.

All challenges to the 1974 judgment were made, and resolved, in *Laffey I* (App. 33a). NWA challenged several features of the remedial order incorporated into the 1974 judgment (App. 113a-155a), but not the provision computing backpay by the difference between purser and stewardess salaries.[19] In the absence of a challenge, that provision was "affirm[ed]" in *Laffey I* (App. 160a).

It was not until 1978, following this Court's denial of certiorari in *Laffey I* and the remand to enable the district court to compute the individual backpay entitlements pursuant to the by-then-affirmed remedial formula, that NWA *for the first time in this litigation* sought a change in the backpay formula on the ground now advanced here. Recognizing that there was no evidentiary foundation in the existing record that could justify the change it was seeking, NWA sought to reopen the record to introduce an affidavit whose purport was that NWA, had it not maintained a dual salary scale, would have instead maintained a single scale below the level actually paid to men. This belatedly tendered affidavit is the "evidence"

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[18] NWA contended that the measurement of that difference be done differently than plaintiffs proposed in one minor respect—a contention that was resolved against NWA (App. 101a-102a, n.153) —but NWA accepted the underlying proposition that the difference between stewardess and purser salaries was the appropriate measure of backpay if backpay was to be awarded.

[19] The appeal did assert the minor point described in n.18, *supra* —a contention again resolved against NWA (App. 101a-102a, n.153)—but did not challenge the use of the stewardess-purser differential as the measure of backpay.

to which NWA refers at pages 7-8 and 17 of its Petition (see App. 31a). The district court refused even to entertain NWA's quest for a revised backpay formula, holding that NWA had waived its claim by not asserting it years earlier (App. 241a). It is that waiver holding which was affirmed in *Laffey III*. NWA has thus waived its right to raise the issue it seeks to present to this court.[20]

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[20] Even if NWA's belated contention had not be held waived, NWA's second question presented would be frivolous, for two reasons:

(a) The only evidentiary foundation for NWA's contention is the affidavit that NWA proffered in 1978. The affiant speculated that had NWA not maintained a dual salary scale following enactment of the Equal Pay Act in 1963, but instead raised the women's salary to the men's (as that Act required), NWA thereafter would have insisted in collective bargaining that salaries be frozen at that level rather than continuing to raise them as in fact it agreed to do; and, the speculation continued, NWA would have prevailed in those negotiations, so that the (hypothesized) equalized rate would not have risen to the levels that the men's rate actually reached. The affiant first came to NWA years after the period to which his speculation related, and thus the affidavit was nothing more than post-hoc conjecture by a person who was not even competent to testify about the pertinent period. Moreover, as NWA had itself declared (in its brief three years before in *Laffey I*), such post-hoc conjecture is so speculative as to be unworthy of credence:

> [I]t is nonsense to assume a contract which was never negotiated. We are not dealing with any specific pay rate, *e.g.*, a minimum wage. A variable collectively-bargained rate is at stake. It is wholly speculative as to what rates would be now if an equal cabin attendant rate had been established at the 1965 Purser level. Lacking evidentiary and logical suport, such speculation is improper. [Appellant's Combined Reply Brief and Brief on Cross-Appeal in Nos. 74-1791 and 75-1334 (*Laffey I*), p. 43.]

What NWA declared in its 1975 brief to be "nonsense," "wholly speculative," and "improper," is what NWA tendered to the district court by affidavit in 1978 and urged as the evidentiary basis for its quest for a change in the backpay formula. (Plaintiffs did not "rebut" the affidavit (Pet. 17) because there was no need to. Plaintiffs advised the court that they would introduce rebuttal

III.

A. NWA's third question presented—the meaning of the term "willful" in 29 U.S.C. § 255(a)—does not merit the Court's attention in this case. NWA is correct that the court below employed a different verbal formulation in defining the test of willfulness than that employed by other Circuits.[21] But that cannot avail NWA. For what

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evidence if NWA's quest were not summarily rejected as untimely, but of course it *was* summarily rejected as untimely.)

(b) This case would not in any event present the issue stated in NWA's second question—whether the courts are "required" to award Title VII backpay in the amount of the difference between men's and women's rates—because the district court never suggested that it was "required" to use that formula. It adopted that formula because both sides had embraced the concept that any backpay should be measured by the difference between purser and stewardess salaries (see pp. 20-21, *supra*). The question that would be posed (were it not waived) would be whether it was an *abuse of discretion* for the district court to adopt a formula that both sides embraced. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 412 (1975). Moreover, even had NWA timely objected to the formula proposed by plaintiffs and proffered a substantial evidentiary basis for its objection, it would not have been an abuse of discretion for the district court to adopt that formula. NWA *concedes* that that formula is *required* for those plaintiffs recovering under the Equal Pay Act (Pet. 16, 18). NWA's contention thus reduces to the unlikely proposition that it is an abuse of discretion for a court to provide the same remedy that Congress required under the Equal Pay Act when the identical violation is being remedied under Title VII. As the court below explained in *dictum* in *Laffey III* (App. 31a-32a), NWA derives no support for that proposition from this Court's analysis in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978).

[21] The court below held that an "employer's noncompliance is 'willful' when he is cognizant of an appreciable possibility that he may be subject to the statutory requirements and [either] fails to take steps reasonably calculated to resolve the doubt [or] . . . consciously and voluntarily charts a course which turns out to be wrong." App. 122a-123a (footnotes omitted).

Prior to *Laffey*, the accepted formula was that established by the Fifth Circuit in *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972), and *Brennan v. Heard*, 491 F.2d 1, 3 (5th Cir. 1974). That formula

NWA ignores is that the formulation adopted by the court below *is more favorable to defendants* than that employed by the other Circuits (see n.21, *supra*), as the court below correctly observed (App. 121a-122a), and the court below found NWA's violations willful under that more rigorous standard. Indeed, the court below observed that NWA's violations would be willful even under the well-established standard governing willfulness in the FLSA's *criminal provision* (App. 122a, n.230).

NWA thus could overturn the decision below only by establishing that *all* of the appellate decisions defining "willful" in § 255(a) were wrongly decided. And that is, indeed, NWA's quest. The common denominator of all the appellate decisions—regardless of their precise verbal formulations—is that a violation is willful if the employer deliberately took action that is forbidden by the statute and did so with cognizance of an appreciable possibility that the affected employees enjoyed the statute's protection. See n.21, *supra*, and n.24, *infra*. All of the appellate decisions reject the notion that "willful" for purposes of

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considers an employer's action "willful" when the employer knew or should have known that his conduct was governed by the FLSA. "Stated most simply, we think the test should be: Did the employer know the FLSA was in the picture?" *Jiffy June*, 458 F.2d at 1142.

Other than the court below, every Court of Appeals to consider the issue has adopted the Fifth Circuit standard. *Donovan v. Simmons Petroleum Corp.*, 725 F.2d 83, 85 (10th Cir. 1983); *Donovan v. Carls Drug Co.*, 703 F.2d 650, 652 (2nd Cir. 1983); *Marshall v. Erin Food Services, Inc.*, 672 F.2d 229, 231 (1st Cir. 1982); *Marshall v. Root's Restaurant, Inc.*, 667 F.2d 559, 560-61 (6th Cir.), *cert. denied*, 459 U.S. 825 (1982); *Marshall v. Union Pacific Motor Freight Co.*, 650 F.2d 1085, 1091-93 (9th Cir. 1981).

The court below (App. 116a) cited one district court decision requiring "that violations of the Act must be deliberate, voluntary and intentional" in order to be "wilfull." *Brennan v. Westinghouse Credit Corp.*, 21 Wage & Hour Cas. 871, 875-76 (E.D. Tenn. 1973). No court of appeals has adopted that standard; and the *Westinghouse* decision cannot be considered to have survived the Sixth Circuit's contrary decision in *Marshall v. Root's Restaurant, Inc.*, *supra*. NWA's effort (Pet. 19) to portray this district court decision as if it were a "circuit[]" decision is disingenuous.

§ 255(a) requires an iniquitous state of mind; all hold that a violation will be willful even though the employer neither believes that its conduct is violative of the Act nor acts with bad faith or ill-will.[22] NWA invites this Court to discard this well-established concord and hold that moral culpability is required (Pet. 22). Two panels of the court below gave NWA's contention painstaking consideration, scrutinized the pertinent legislative materials, and found NWA's contention wanting (App. 117a-123a (*Laffey I*); App. 25a-29a (*Laffey III*)). And NWA proffers nothing to suggest why, in the face of an unbroken line of appellate decisions rejecting it, NWA's contention should occupy this Court's attention.

B. NWA seeks to infuse its "willful" question with a significance it does not possess, by tying it to the issue pending before this Court in *Trans World Airlines, Inc. v. Thurston*, No. 83-997, respecting the definition of "willful" as it appears in Section 7(b) of the Age Discrimination in Employment Act, 29 U.S.C. § 626(b). NWA's attempt to piggy-back on *Thurston* is specious.

"Willful, as we have said, is a word of many meanings, its construction being influenced by its context." *Spies v. United States*, 317 U.S. 492, 497 (1943). The ADEA provision is in a different statute, enacted by a different Congress, and serves a different purpose, from § 255(a). The ADEA provision determines not whether a victim of an ADEA violation will recover lost wages, but whether such a victim will recover an equal additional amount as liquidated damages. In contrast, § 255(a) determines whether an FLSA victim will be compensated *at all* for a year during which wages were wrongfully withheld (or whether, conversely, the employer will retain the wages

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[22] *See, e.g., Donovan v. Simmons Petroleum Corp., supra*; *Castillo v. Givens*, 704 F.2d 181, 193 (5th Cir.), *cert. denied*, —— U.S. ——, 104 S. Ct. 160 (1983); *Donovan v. Carls Drug Co., supra*; *Marshall v. Erwin Food Services, Inc., supra*; *Marshall v. Root's Restaurant, Inc., supra*; *Marshall v. Union Pacific Motor Freight Co., supra.*

wrongfully withheld). The fact that § 255(a) determines the availability of compensatory ("make whole") relief—and is in no sense a punitive provision—was deemed "especially important" by the court below in concluding that "willful" in § 255(a) does not require moral culpability (App. 28a). Those who are arguing for a moral culpability standard for willfulness under the ADEA rely heavily upon what they claim is evidence in the legislative record that Congress intended liquidated damages under the ADEA to be a punitive sanction.[23] Whether or not that reading of the ADEA legislative history is correct, and whether or not it carries the day in *Thurston*, it has no conceivable implication for the meaning of "willful" in § 255(a).

No party in *Thurston* has suggested that willful *as used in § 255(a) of the FLSA* requires moral culpability.[24] Indeed, the only reference to § 255(a) in the *Thurston* briefs is the request of the EEOC that this court construe the term "willful" in the ADEA provision similarly to the well-established definition of the term as it appears in § 255(a).[25] Whatever the merit of *that* position, it is a contention of an entirely different order to suggest (as NWA does) that a decision by this Court holding, on the

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[23] Brief of Trans World Airlines, Inc., in *Thurston*, pp. 34-35; Brief Amicus Curiae of the Chamber of Commerce of the United States, *id.*, p. 8; Brief Amicus Curiae of the Equal Employment Advisory Council, *id.*, pp. 10-11.

[24] The Solicitor General advised this Court in *Thurston* that in construing § 255(a) "the courts have unanimously rejected any specific intent requirement," EEOC Br. 33, n.38, and that "[t]he courts of appeals uniformly have held that Congress used the term 'willful violations' in [§ 255(a)] to describe situations in which the employer took actions in fact prohibited by the statute and was, or should have been, cognizant of an appreciable possibility that the employees involved were covered by the statutory provisions," *id.* at 32.

[25] EEOC Br. 32-33.

basis of the particular legislation history of the ADEA, that the ADEA provision requires moral culpability would provide the basis for rolling back the unbroken interpretation of the earlier-enacted § 255(a).

Moreover, even if NWA were to prevail in securing a remand for redetermination pursuant to such a standard, it is inconceivable that NWA could escape a finding of willful given the statements already made by the courts below as to NWA's animus (see pp. 11-13 *supra*). There will be ample opportunities for this Court to decide the meaning of "willful" as used in the FLSA, should the Court think that issue worth reviewing, in future cases where, unlike here, a change in definition might ultimately be outcome determinative. As the court below observed, a definitive resolution of the precise locus of the line that divides willful from non-willful violations under § 255(a) can await "cases closer than the one at bar" (App. 122a). And, as well, it can await a case in which discriminatees have not already waited 17 years to be made whole for the injuries they have suffered.

IV.

NWA's fourth question—which involves the standards governing liquidated damages in actions governed by the FLSA—is not presented by the decision below, for the court below did not hold, as NWA asserts, that the considerations advanced by NWA were "completely irrelevant as a matter of law" to the liquidated damages determination (Pet. i, Par. 4).[26]

Under the FLSA, liquidated damages are mandatory unless the employer carries its burden of proving *both*

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[26] For good reason, NWA does not attempt to tie *this* question to the issue of liquidated damages pending in *Thurston*. In enacting the ADEA, Congress "altered the circumstances under which [liquidated damages] would be available in ADEA actions" from those applicable under the FLSA. *Lorillard v. Pons*, 434 U.S. 575, 581, n.8 (1978).

that "he had reasonable grounds for believing that his act or omission was not a violation" *and* that his "act or omission . . . was in good faith," 29 U.S.C. § 260. Court of Appeals decisions over four decades have unfailingly held that the two standards are separate, the first requiring an objective inquiry and the second a subjective inquiry, and that an employer can escape liquidated damages only by prevailing on both.[27]

In this case, the district court found that NWA failed to prove *either* of the prerequisites to escaping liquidated damages (App. 250a-256a), and the court below, in *Laffey III*, affirmed the district court as to both (App. 46a-52a). Since failure to prevail on *either* ground would be fatal to NWA's effort to escape liquidated damages, the question NWA seeks to present—whether an employer's "traditional practice," "industry practice," union "acquiescence," and employee quiescence are relevant considerations under § 260—could be outcome determinative in this case (and thus properly presented here) only if the court below had declared those considerations irrelevant to *both* of the standards established by § 260.

The court below did not do so. It held only that the four considerations are irrelevant to the "reasonable grounds" standard. The court in *Laffey I* explained that the "reasonable grounds" standard—the "objective" criterion—turns on whether there actually exist "ambiguous or complex legal requirements" or "legal uncertainty," such that a well-motivated employer *could* arrive at a "good faith but erroneous belief that he is in conformity with the Act" (App. 131a-132a). And the factors cited

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[27] *See e.g., Sinclair v. Automobile Club of Oklahoma, Inc.*, 733 F.2d 726, 730 (10th Cir. 1984), and cases cited therein; *Burnley v. Short*, 730 F.2d 136, 139-40 (4th Cir. 1984), and cases cited therein; *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982), and cases cited therein; *Beebe v. United States*, 640 F.2d 1283, 1295 (Ct. Cl. 1981); *McClanahan v. Matthews*, 440 F.2d 320, 322-23 (6th Cir. 1971); *Wright v. Carrig*, 275 F.2d 448 (4th Cir. 1960); *Rothman v. Publicker Indus., Inc.*, 201 F.2d 618, 620 (3d Cir. 1953).

by NWA were held not relevant to *that* inquiry (App. 130a):

> That an employer and others in the industry have broken the law for a long time without complaints from the employees is plainly not *the reasonable ground* to which the statute speaks. [Emphasis added].

But the court below did not hold that the factors cited by NWA were irrelevant to the "subjective" criterion in § 260, the "good faith" standard. Indeed, the court in *Laffey III* reiterated that these factors were held irrelevant only to the "reasonable grounds" standard (App. 49a), and NWA's own brief to the Court of Appeals in *Laffey III* recognized that the Court in *Laffey I* had held these factors irrelevant only to "reasonable grounds."[28] Rather, the court below held that these factors did not establish NWA's "good faith" in the particular circumstances of this case, when evaluated in the context of the whole record, for there was an abundance of additional evidence that showed NWA had not acted in good faith.[29]

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[28] Brief of Northwest Airlines, Inc. in *Laffey III*, at 72, n.*.

[29] The court below defined the test of "good faith" under § 260 as whether the employer had "an honest intention to ascertain what the [Equal Pay] Act requires and to act in accordance with it" (App. 47a, 127a). NWA does not challenge that standard, which has been applied by the courts for over 30 years. See *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 93 (2d Cir.), *cert. denied*, 346 U.S. 877 (1953). In affirming the district court's finding that NWA had not shown "good faith" as thus defined, the court below noted that the evidentiary weight that might otherwise be warranted by the factors cited by NWA was substantially reduced in the circumstances of this case, for "the prevalence of sex-discrimination litigation against the airline industry" would have alerted a well-intentioned employer that it could not trust "its own tradition, the industry custom nor the employees' silence [to be] a reliable indicium of the demands of the law" (App. 48a). (NWA's own prior sex-discrimination litigation experiences are described at App. 185a-187a). Beyond that, the court below affirmed the district court's reliance on a host of *other* evidence that showed that NWA had not had an "honest intention" either to "ascertain what the Act requires" or "to act in accordance with

Because the court below did *not* rule the factors cited by NWA to be irrelevant to the "good faith" determination, because NWA does not challenge that determination on any other ground, and because that determination alone establishes that NWA was required to pay liquidated damages, NWA's fourth question simply is not presented in this case.[30]

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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it": the negligible (virtually non-existent) effort made by NWA following passage of the Equal Pay Act to assess the Act's impact upon NWA's dual salary scale (App. 49a-50a, n.40); NWA's substantial delays in curing other sex-discrimination violations even after it knew they were unlawful (App. 51a); and NWA's persistence in the equal pay violation for six years after suit was brought (when none of the factors cited by NWA any longer pertained)—indeed for two years after the district court declared the salary differential unlawful (App. 51a & n.42).

[30] In any event, NWA's attempted reliance on the declaration of policy in 29 U.S.C. § 251 (Pet. 24-25) is misplaced. That declaration explained *not* the reasons for enacting § 260, but the reasons for enacting 29 U.S.C. § 252: the "purpose" articulated in § 251 was "fulfilled by the enactment of Section 2 [§ 252]." *Steiner v. Mitchell*, 350 U.S. 247, 253 (1956). See also *Battaglia v. General Motors Corp.* 169 F.2d 254, 258 (2nd Cir. 1948); *Addison, supra*, 204 F.2d at 96 (L. Hand., Jr., concurring). The legislative materials make clear that entirely different considerations prompted Congress to enact § 260. *See* App. 128a-129; H. Rep. No. 71, 80th Cong., 1st Sess., 3, 7-8 (1947).

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No. 84-825

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Petitioner,

v.

MARY P. LAFFEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Chamber of Commerce of the United States ("Chamber") hereby moves for leave to file the attached brief *amicus curiae* in support of the petition for certiorari in this case pursuant to Supreme Court Rule 36.1. This motion is necessary because the respondents declined to consent to the filing of the brief. The petitioner,

Northwest Airlines, Inc., has consented to the filing.[1] This amicus brief is timely filed under Supreme Court Rule 36.1, as it is filed within 30 days, the time allowed by Supreme Court Rule 22.1 for the filing of a brief in opposition to the petition for certiorari.

This case arose out of the petitioner's classification of cabin attendants some 14 years ago. Northwest maintained two such classifications, one of which was not available at that time to women.

The lower court's disposition of the case raised several problematic issues that require clarification by this Court. Those issues are (a) whether discriminatory motive on the part of an employer is required for a finding of liability for disparate wages under the Equal Pay Act, 29 U.S.C. § 206(d), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, 2000e-5(g); (b) whether an "objective job evaluation system" is required before the "factor other than sex" defense can be asserted; (c) the meaning of the term "willful violation" within the Fair Labor Standards Act, 29 U.S.C. § 255 ("FLSA") and the Equal Pay Act; and (d) the relevance of industry practice and approval in *bona fide* collective bargaining agreements to a determination of an employer's "good faith" and "reasonable grounds" in concluding that an employment practice is lawful.

The Chamber is concerned about the great consternation this decision is causing in the business community, where an employer with a legitimate belief that one position requires greater skill than another, and thus justifies higher pay, now must fear liability without regard to his motive or the reasonableness of his belief. The Chamber believes it is important for this Court to recognize the need for a clearly defined standard governing challenges to the lawfulness of wage rates. Employers cannot now

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[1] Copies of the consent letter are being filed simultaneously with the attached brief.

be certain about the proper bases for wage differentials, and multi-jurisdictional employers may be subject to varying standards in different parts of the country.

Moreover, differing interpretations of the term "willful violation" in the Fair Labor Standards Act and the Equal Pay Act (a component of the FLSA) have injected confusion and inequity into the administration of these statutes.

The question of the meaning of "willful violation" within the FLSA and the Equal Pay Act is closely related to the willfulness issue under the Age Discrimination in Employment Act now before the Court in *TWA v. Thurston*, No. 83-997. The Chamber submitted a brief *amicus curiae* in *Thurston* as well. Confusion about the meaning of "willful violation" creates an enormous burden on employers, who are required to comply with all three statutes. The burden is particularly heavy for multi-jurisdictional employers, who may be subject to different standards, and small business owners, who lack the resources to keep current on the latest legal developments.

The issues presented by this case are fundamental to the application of the Equal Pay Act and Title VII. Guidance in complying with this legislation is critical to the business community. As the largest federation of business organizations and individuals in the United States, and the principal spokesman for the American business community, the Chamber is well-suited to present the broad interest of business in this case. The Chamber's current membership exceeds 184,000, including over 180,000 corporations, partnerships and proprietorships, as well as over 2,900 trade associations, and local and state chambers. As one of its principal functions, the Chamber regularly presents its views before this Court, as well as the lower federal courts.[2]

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[2] *See, e.g., TWA* v. *Thurston, cert. granted,* 52 U.S.L.W. 3625 (U.S. Feb. 27, 1984) (No. 83-997); *Bowen* v. *U.S. Postal Service,* —— U.S. ——, 74 L.Ed. 2d 402 (1983); *Amoco Production Co.* v. *NLRB,* 613 F.2d 107 (5th Cir. 1980).

Businesses attempting to comply with wage discrimination laws are currently confronted with complex, multiple legal tests. A uniform standard is essential to fair administration of the law. It is for these reasons that the Chamber respectfully requests leave to file the attached brief. Businesses attempting to comply with wage discrimination laws are currently confronted with complex, multiple legal tests. A uniform standard is essential to fair administration of the law.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-825

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

MARY P. LAFFEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to its Motion for Leave to File Brief Amicus Curiae for a statement of the Chamber's interest in this proceeding.

ARGUMENT

Because of its breadth, the decision of the Court of Appeals in *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976) (*"Laffey I"*), *cert. denied*, 424 U.S. 1096 (1978), has received extensive attention from other courts addressing equal pay claims under the Equal Pay Act and Title VII of the Civil Rights Act of 1964, as

well as from courts confronting numerous issues under the Fair Labor Standards Act (of which the Equal Pay Act is a part). The decision has been cited or discussed, sometimes critically, in hundreds of cases in the federal and state courts. Thus, it is particularly important that this Court grant review to determine whether the rulings in *Laffey* are sound and consistent with the holdings of this Court and to ensure that they do not lead to confusion in critical areas of employment law.

I. CONFUSION EXISTS AFTER *GUNTHER* CONCERNING THE "FACTOR OTHER THAN SEX" DEFENSE TO EQUAL PAY CLAIMS BASED ON ALLEGED SEX DISCRIMINATION.

A. This Court Should Resolve The Conflict Over Whether Discriminatory Intent Is An Element Of Sex-Based Wage Discrimination Claims.

In *County of Washington v. Gunther*, 452 U.S. 161 (1981), this Court held that the Bennett Amendment to Title VII, 42 U.S.C. 2000e-2(h), incorporates into Title VII the four defenses contained in the Equal Pay Act. *See* 29 U.S.C. § 206(d)(1). This Court focused specifically on the fourth defense, which provides that an employer is not liable for paying a member of one sex more than a member of the opposite sex for performing "equal work" if the wage differential is "based on any other factor other than sex." The Court noted that this defense was "designed differently" from Title VII's "broadly inclusive" prohibition of discriminatory employment practices. 452 U.S. at 170. The Court distinguished sex-based equal pay claims, whose coverage is "confine[d]" to "wage differentials attributable to sex discrimination," from other types of discrimination claims falling under the broader provisions of Title VII, which the Court described as "proscribing 'not only overt discrimination but also practices that are fair in form, but discriminatory in operation.'" *Id., quoting Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Courts and

comentators subsequently have interpreted the *Gunther* analysis as meaning that "proof of disparate treatment, not just disparate impact," is required "in claims of sexual discrimination in compensation." G. Rutherglen, *Major Issues in the Federal Law of Employment Discrimination* 53 (Federal Judicial Center 1983); *see e.g.* authorities cited in Northwest Petition at 10-11. If the ultimate issue is one of disparate treatment rather than merely disparate impact, discriminatory intent is an essential element of every equal pay case under the Equal Pay Act and Title VII. *See Connecticut v. Teal*, 457 U.S. 440, 446 (1982).

Not all circuits, however, have drawn this inference. While the Fifth and Ninth Circuits regard discriminatory intent as crucial to finding liability in equal pay cases, the District of Columbia and Tenth Circuits do not.[1] This Court should grant certiorari to resolve the conflict concerning this question, which has enormous legal and practical significance. It is important for employers, employees, and courts to have a single, clearly defined standard governing the challenges to the lawfulness of wage rates under which some men and some women may fare differently.

The interpretation of the language of the Equal Pay Act adopted by *Gunther*—incorporating the concept of

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[1] *Compare Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071 (D.C. Cir. 1984) (*"Laffey III"*); *Sinclair v. Automobile Club of Oklahoma, Inc.*, 733 F.2d 726 (10th Cir. 1984), with *Maxwell v. City of Tucson*, 35 FEP Cases 355 (9th Cir. 1984); *Plemer v. Parsons-Gilbane*, 713 F.2d 1127 (5th Cir. 1983).

Although most commentators have agreed that *Gunther* limits equal pay claims to instances of intentional discrimination, some have argued against that result. *Compare, e.g.*, Gould, *The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. Col. L. Rev. 1, 66 (1981); Note, *Age Discrimination and The Disparate Impact Doctrine*, 34 Stan. L. Rev. 837, 846 (1982), *with* Note, *Gender-Based Wage Discrimination and the Bennett Amendment: County of Washington v. Gunther*, 1982 B.Y.U. L. Rev. 401, 407-12.

discriminatory intent—is consistent with the traditional notion of discrimination that had been embodied in prior anti-discriminaton provisons. Earlier provisions unquestonably require a showing of discriminatory intent. *See, e.g., Washington v. Davis*, 426 U.S. 229 (1976) (discrimination claims under the Constitution); *Personnel Administrator v. Feeny*, 442 U.S. 256 (1979) (same); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (discrimination claims under the Civil Rights Act of 1866). The Equal Pay Act of 1963, which prohibits employers from "discriminat[ing] . . . on the basis of sex," was conceived against this backdrop of anti-discrimination legislation. *See* 109 Cong. Rec. 9195, 8915 (1963) (remarks of Rep. Powell, Sen. Randolph). The court below, in rejecting an intent requirement for equal pay liability, ignored congressional intent and the longstanding definition of "discrimination" generally understood at the time the Equal Pay Act was adopted.

The language of the 1964 Civil Rights Act vividly illustrates this key distinction. In Section 703(a)(1) of Title VII, Congress used language comparable to that used in the Equal Pay Act, banning "discrimination" against employees. Section 703(a)(1) is the statutory basis for "disparate treatment" claims, which this Court has held require a showing of discriminatory intent. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). Similarly, claims under Titles II, VI and IX of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000a, 2000d; 20 U.S.C. § 1681, which also bar "discrimination" on various bases, require a showing of discriminatory intent. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 696 (1979); *Cannon v. University of Chicago*, 648 F.2d 1104 (7th Cir.), *mandamus denied*, 454 U.S. 811, *cert. denied*, 454 U.S. 1128 (1981), *and* 460 U.S. 1013 (1983); *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981); *Bronson v. Board of Education*, 550 F. Supp. 941 (S.D. Ohio 1982).

In stark contrast, Section 703(a)(2) of Title VII, which provides the basis for the "disparate impact" claims recognized in *Griggs*, prohibits any practice that "tends to deprive" a person of employment opportunities or "adversely affects" him. This language sweeps more broadly than the traditional concept of intentional "discrimination" embodied in Section 703(a)(1) of Title VII and in the Equal Pay Act. The Court of Appeals in *Laffey*, however, ignored this distinction in holding that the issue of discriminatory intent is irrelevant to equal pay claims.

B. This Court Should Clarify What Constitutes A "Factor Other Than Sex."

The opinion below in *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071 (D.C. Cir. 1984) (*"Laffey III"*), compounds the confusion in the lower courts over the test for liability on equal pay claims after *Gunther*. In addition to ruling that discriminatory intent is not an issue in equal pay cases, the court below limited the "factor-other-than-sex" defense to "objective job rating systems" or "objective job evaluation systems." Pet. App. 12a. This holding is in direct conflict with the legislative history of the Equal Pay Act, which demonstrates that Congress did not intend to obligate an employer to institute a formal job evaluation system in order to avail himself of the "factor-other-than-sex" defense. 109 Cong. Rec. 9198, 9203 (1963) (remarks of Rep. Goodell, Rep. Griffin). In addition, the Chamber is concerned that the highly restrictive interpretation of the fourth defense in *Laffey III* may have the effect of reading the fourth defense out of the Equal Pay Act. Moreover, since it is in conflict with other decisions construing the defense, the ruling below subjects employers to varying and confusing standards.

The court below ruled that it is irrelevant to the "factor-other-than-sex" defense that the employer relied on a good faith internal assessment of the content and

requirements of the respective jobs and on the extensive history of *bona fide* collective bargaining, which had defined job categories and established wage rates. Instead, the court held that, in order to rely on the "factor-other-than-sex" defense in a case in which the court finds that two jobs, believed by the employer to be different, are in fact "substantially" equal, the employer must establish that the different wage rates were based upon a formal, "objective" "job rating" or "job evaluation system."

The first three defenses of the Equal Pay Act, however, expressly deal with systems of that type and vindicate pay differentials based on the mechanical application of a "system" to determine wages. Those defenses cover seniority systems, merit systems and systems that measure earnings by quality or quantity of production. 29 U.S.C. § 206(d)(1)(i)-(iii). The fourth defense, by contrast, does not require use of any "system," but affords the employer a defense if he relies on *any* factor other than sex. By circumscribing the fourth defense to mechanically applied "systems," the court below has effectively read the defense out of the statute and virtually has required all employers, regardless of their size, to institute a formal rating system in order to avoid the risk of an equal pay claim. The Chamber believes that such a requirement goes far beyond the intent of Congress and, if followed, would impose enormous burdens and expense on employers.[2]

Moreover, under the decision below, employers cannot rely on the kinds of criteria that they have in the past,

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[2] As a practical matter, the *Laffey III* holding imposes the same burden on employers as would a pure "equal pay for comparable worth" standard, since under a "comparable worth" standard employers would be forced to set up massive and costly job rating systems to compare jobs. *See* Spelfogel, *Equal Pay for Work of Comparable Value: A New Concept*, 32 Lab. L.J. 30 (1981); Note, *Equal Pay, Comparable Work, and Job Evaluation*, 90 Yale L.J. 657, 674-77 (1981).

with the approval of other courts, in establishing wage differentials. For example, courts have permitted an employer to pay more to one professional employee than another of the opposite sex, admittedly doing equal work, in response to outside job offers. *E.g., Winkes v. Brown University*, 36 FEP Cases 120 (1st Cir. 1984). The emphasis in *Laffey III* on job rating systems does not leave room for such a market evaluation of an employee's worth. Similarly, an employer might believe in good faith that a male employee doing the same job as women has supervisory potential and, hence, decide to pay him more to retain his services until a supervisory position becomes available. Under *Campbell v. Von Hoffman Press, Inc.*, 632 F.2d 69 (8th Cir. 1980), that pay differential would be based, permissibly, on a "factor other than sex;" under *Laffey III* it would not.

Finally, by foreclosing reliance on *any* subjective evaluation, the approach in *Laffey III* seems to make the "factor-other-than-sex" defense even harder for employers to establish than the "business necessity" defense otherwise applicable under Title VII. Applying normal Title VII principles, courts have permitted employers to use subjective criteria—such as "leadership ability," "ability to get along with others," the "ability to plan," "personality" and the like—in justifying allegedly discriminatory employment practices. *See, e.g., Adams v. Reed*, 567 F.2d 1283 (5th Cir. 1978); *Frink v. United States Navy*, 16 FEP Cases 67 (E.D. Pa. 1977), *affd mem.*, 609 F.2d 501 (3d Cir. 1979), *cert. denied*, 445 U.S. 930 (1980). Yet *Gunther* said that the incorporation into Title VII of the "factor-other-than-sex" defense made Title VII *less* "broadly inclusive" of sex-based wage discrimination claims than of other kinds of discrimination claims. 452 U.S. at 170.

The interpretation of the fourth defense adopted in *Laffey III*, therefore, turns *Gunther* on its head. Indeed, if a factor as subjective as "enthusiasm and attitude

about the job" can justify an otherwise discriminatory promotional decision, *see* EEOC Dec. 75-225, 21 FEP Cases 1774 (1975), there is no reason in logic or policy why an employer's good faith assessment of job content—confirmed by *bona fide* collective bargaining—should not be a permissible "factor other than sex" on which the employer may rely in setting wage rates.

The Chamber is concerned about the confusion that *Laffey* is causing in the business world. Employers are now subject to a high degree of uncertainty about proper bases for wage differentials, and multi-jurisdictional employers may be subject to different standards in different parts of the country. Guidance from this Court is necessary to provide employers and lower courts with a settled understanding about what constitutes a "factor other than sex." On behalf of the business community, therefore, the Chamber of Commerce urges this Court to grant certiorari to resolve the conflict among the circuits and to clarify the law.

II. THE COURT SHOULD RESOLVE THE CONTROVERSY OVER THE MEANING OF "WILLFUL VIOLATION" BY CONSIDERING ALL AFFECTED STATUTES AND THE PERTINENT LEGISLATIVE HISTORY.

In January 1984, the Chamber filed a brief *amicus curiae* urging the Court to grant certiorari in *TWA v. Thurston*, No. 83-997, to resolve the meaning of the term "willful violation" under the Age Discrimination in Employment Act (the "ADEA"), 29 U.S.C. § 626(b). The Court has granted certiorari and recently heard oral argument in that case. The Chamber now urges the Court to grant certiorari in *Laffey* to decide the meaning of "willful violation" under the Fair Labor Standards Act (the "FLSA") and the Equal Pay Act. Only by resolving both cases at the same time can the Court be certain

of properly carrying out Congress' intent in adopting the term "willful violation" in those three related federal statutes governing an employer's obligations to his employees.

A. The Willfulness Issue in *Thurston* Should Be Decided In the Broader Context Illuminated By *Laffey*.

The ADEA, the only statute at issue in *Thurston*, provides that a plaintiff may recover liquidated damages by demonstrating a "willful violation" of the Act. 29 U.S.C. § 626(b). *Laffey* involves the provision of the Fair Labor Standards Act, which includes the Equal Pay Act, permitting an employee to recover a third year of backpay in the case of a "willful violation." 29 U.S.C. § 255.

While *Thurston* appeared to present a relatively narrow issue under the age discrimination statute, the Court's resolution of the willfulness issue in *Thurston* may effectively control the interpretation of the "willful violation" provision of the Fair Labor Standards Act and the Equal Pay Act. Congress adopted the willfulness provision of the Fair Labor Standards Act, 29 U.S.C. § 255, in 1966. *See* Pub. L. No. 89-601. That provision applies to all claims under the FLSA, including those under its Equal Pay Act component. When Congress passed the ADEA the following year, it expressly incorporated § 255 of the FLSA to govern the backpay recovery period under the ADEA, 29 U.S.C. § 626(e)(1). Thus, the "willful violation" language of § 255 establishes the standard for recovering a third year of backpay under all three statutes. At the same time, Congress also incorporated the language of § 255 into the liquidated damages provision of the ADEA, 29 U.S.C. § 626(b), which permits an employee to recover double damages (as well as the extra year of backpay) in the case of a "willful violation" of the ADEA. It is only this latter provision which is at issue in *Thurston*.

As the parties agreed in *Thurston*, there is a natural presumption that a term used twice in the same legislation is intended to convey one meaning. Thus, it is virtually inescapable that the term "willful violation" has the same meaning under both § 626(b) and § 626(e)(1) of the ADEA. In turn, since § 626(e)(1) expressly incorporates § 255 of the FLSA by reference, the same interpretation of the term "willful violation" would have to be followed under the Fair Labor Standards Act and the Equal Pay Act.

Consideration of the meaning of "willful violation" in the broader context of § 255 of the FLSA would aid this Court in reaching a proper construction of the term in light of all the relevant legislative history. As the Chamber stated in its brief in *Thurston*, "Congress did not define the term" in the ADEA and the legislative history of that Act itself "sheds no light on what was intended." Brief *Amicus Curiae* of Chamber of Commerce, at 3. There is, however, legislative history demonstrating Congress' intended meaning when it adopted the term "willful violation" in amending § 255 of the FLSA in 1966. The only detailed, scholarly analysis of this legislative history unequivocally confirms that this Court should adopt the standard which the Chamber advocated in its brief in *Thurston*. *See* Brief *Amicus Curiae* of Chamber of Commerce in *Thurston*, at 4-6. *See also* Note, *Standards of Willfulness And The Fair Labor Standards Act*, 78 Mich. L. Rev. 626 (1980).

B. A Single Standard Under All Three Statutes Will Ensure Consistent, Predictable Results For Employers.

The confusion over the meaning of the term "willful violation" naturally infects cases brought under all three of the statutes at issue. While some courts have required

that "violations of the Act must be deliberate, voluntary, and intentional," others have adopted different standards requiring only some level of awareness of the "possible applicability" of the law to the employer's conduct. *Laffey I*, 567 F.2d at 459. *See also* Brief *Amicus Curiae* of Chamber of Commerce in *Thurston*, at 3-5 (discussing in detail conflicting interpretations of "willful violation" in ADEA cases).

The confusion is compounded by the difficulty of reconciling the differing formulations of "willful violation" with other, related provisions of each of the three statutes involved. Under the Fair Labor Standards Act and the Equal Pay Act, the availability of liquidated damages depends upon whether the employer acted in "good faith" and with "reasonable grounds" for believing the practice was lawful. 29 U.S.C. §§ 216(b), 260. The "willful violation" standard only governs the backpay period. 29 U.S.C. § 255. Under the ADEA, however, the "willful violation" standard governs both the availability of liquidated damages and the backpay period. The meaning of the term "willful violation" thus should be examined in light of the overall statutory scheme and the relationship among these provisions.

The confusion over the meaning of the term "willful violation" creates an enormous burden on employers who, typically, are required to comply with all three statutes. The burden is particularly great for multi-jurisdictional employers who are subject to varying standards of conduct, and for owners of small businesses, who lack the financial resources to keep up to date on the latest legal developments. The Chamber urges the Court to put an end to this conflict and confusion by establishing a single standard for determining willfulness under all three statutes. A single standard would respond to the business community's need for guidance.

III. THE STANDARD ADOPTED BY THE COURT BELOW FOR ASSESSING LIQUIDATED DAMAGES IS UNWORKABLE AND CONFLICTS WITH THE APPROACH IN OTHER CIRCUITS.

The district court in this case originally relied on several factors in deciding to remit liquidated damages; among them were the company's historical practice, industry custom, collective bargaining and employee acquiescence. In *Laffey I*, however, the Court of Appeals ruled that these factors could not be considered in assessing whether an employer had "reasonable grounds" for believing his actions were lawful. 29 U.S.C. § 260. That holding severely limits the grounds on which most employers traditionally have assessed the reasonableness of their conduct, and may make it impossible for many employers ever to demonstrate that they have acted in good faith. Indeed, under *Laffey I*, there may be no case in which an employer could escape double damages. That, obviously, is not what Congress intended.

Laffey I makes "legal uncertainty" the touchstone for determining the reasonableness of an employer's conduct. By narrowly focusing on the "absence of any clear legal precedent or guideline precisely in point," *see* Pet. App. 127a-128a, the Court of Appeals shifts the arena for assessing the "reasonableness" of the employer's conduct from the workplace to the lawyer's office. Whether or not that may be realistic for major corporations with access to legal staffs or law firms, it is highly unfair to small and medium-sized businesses without the resources to turn to lawyers every time they must make an employment decision. Indeed, for most businessmen, the four factors rejected by *Laffey I* are the only available means for gauging their conduct. It is unrealistic to force them to rely instead on "legal precedent" as the *only* means for showing that they acted reasonably in believing that an employment practice was permissible. That outcome would frustrate the congressional intent of moderating the harshness of double damages.

As pointed out in Northwest's Petition (at 23-25), the ruling of the D.C. Circuit conflicts with the holdings of numerous other courts. It also runs counter to Congress' clear purpose in the 1947 portal-to-portal amendments to avoid "immense" and "unexpected liabilities" arising from "long-established customs, practices, and conflicts between employers and employees." 29 U.S.C. § 251(a); *see also* 29 U.S.C. § 251(b). The Chamber urges the Court, which has never considered the liquidated damages provision of the FLSA, to step in to resolve the conflict created by the decisions below and to clarify the standards that are to be applied to employers in thousands of FLSA cases.

CONCLUSION

The Chamber of Commerce respectfully urges this Court to grant the petition for certiorari filed by Northwest Airlines, Inc.

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No. 84-825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHWEST AIRLINES, INC.

Petitioner,

v.

MARY P. LAFFEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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The plaintiffs concede that the "facts of this case are as set forth in the district court's extensive findings." Opp. at 1. Nevertheless, they ask this Court, in contravention of principles laid down in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), to go behind the trial judge's findings and to examine the trial evidence in order to draw inferences that the trial judge never drew. Northwest, on the other hand, is relying only on the actual findings by the trial judge. The legal issues that flow from those *findings* are worthy of this Court's attention.

I. THE RELEVANCE OF INTENT

1. **Waiver.** Plaintiffs assert that Northwest "waived" the argument that it did not intend to discriminate on the basis of sex in establishing the pay differential, because that position is an "affirmative defense" that the Company did not formally plead. The court of appeals, however, refused to rely on this objection, and with good reason. This case was one of the first major Equal Pay Act litigations, and it actually went to trial before a detailed body of substantive and procedural law had developed. Thus, although plaintiffs rely on *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974), as establishing that the Equal Pay Act defenses are "affirmative defenses," that case was decided five years after Northwest answered the complaint and three years after trial.

Moreover, the pleading question is irrelevant, since Northwest's intent in paying different wages to pursers and stewardesses was always an issue. In their complaint, plaintiffs alleged that Northwest discriminated "solely upon sex" in violation of the Equal Pay Act in paying pursers more than stewardesses and "intentionally" discriminated against women "because of their sex with respect to the compensation they receive." *Laffey I* J.A. 19, 20, 22. Northwest denied those allegations. The question whether the differential was motivated by sex or by a determination that the jobs were different was a litigated issue. After trial, plaintiffs argued that the "evidence

makes clear that the unifying factor which has determined the higher salary of pursers" was "that the Company's pursers have all . . . been men" (Pl. Post-trial Br. at 38), but the trial judge refused to find that the "unifying factor" underlying the pay differential was sex. Since the trial judge actually made the necessary findings relevant to the issue of intent, it is irrelevant now which party had what burdens of pleading and proof. *See* Fed. R. Civ. P. 15(b).

2. **Findings Concerning Intent.** Plaintiffs invite this Court to fall into the same trap as did the court of appeals: they conflate the distinct questions involved in the claim of *promotion* discrimination with those relevant to the equal pay claim, and thereby seek to create a legal presumption about Northwest's reasons for paying pursers and basic cabin attendants differently. At most, Northwest's promotional policy could be considered evidence that the trier of fact could evaluate in deciding whether the pay differential was motivated by sex. *See, e.g., Taylor v. Charley Bros. Co.*, 25 FEP Cases 602 (W.D. Pa. 1981). Here, however, far from drawing an inference of discriminatory motive, the trial judge linked the pay differential to Northwest's specific assessment that the jobs themselves were different and merited different pay, an assessment that we contend is a "factor other than sex." Petition at 6-7, 14-15.

The judge correctly recognized the legal distinction between plaintiffs' promotion claim and their equal pay claim. *Compare* Conclusions of Law 3 & 4 *with* 5(a) (App. 217a). Plaintiffs urged the trial judge to find that Northwest had intentionally discriminated both in setting the wage scales and in limiting promotional opportunities. In connection with plaintiffs' *promotion* claim, the court specifically found that Northwest "desire[d] to confine the purser position to males," in violation of Title VII. App. 181a-183a. There were no similar findings, however, indicating that the wage scales themselves were motivated by a desire to pay men more than women; indeed, such a finding would have been virtually impossible to reconcile with the judge's explicit finding that, at "all times from

1949 to the present, [male] FSA's and stewards have been compensated at the same rate as stewardesses of equal longevity." App. 169a.[1] The findings upon which plaintiffs now seek to rely (Opp. at 11) involve solely the trial judge's assessments of the differences and similarities between the jobs. They do not purport to resolve the issue of Northwest's intent in reaching a contrary assessment.[2]

Plaintiffs ask the Court to ignore the trial judge's finding that Northwest had honestly "believed" that the jobs were different, App. 220a, because he made the finding in explaining why he was not awarding liquidated damages. That contention is puzzling, to say the least, because the issue before the judge was, as plaintiffs acknowledge, the nature of Northwest's "belief in the existence of [job] differences." Opp. at 13. Thus, the finding on that question goes to the very heart of Northwest's motivation in paying different salaries for the two jobs. On remand, the trial judge again found as a matter of fact that Northwest management had "concluded that the jobs of purser and

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[1] Plaintiffs also downplay the number of basic cabin attendants who were men and received the same pay as women. Although their numbers varied over the period 1949-1976, hundreds of men served as basic cabin attendants and received the same salary as women in that job. App. 167a-169a.

[2] Plaintiffs seem to suggest that Northwest's assessment that the purser job entailed significantly greater responsibilities was bogus. They emphasize that Northwest's Cabin Service Manual did not use the word "supervisor" in referring to pursers. Opp. at 5. This is a semantic ploy, since as the trial judge found the job definition in every collective bargaining agreement over 25 years provided that pursers "may be designated as being *in charge of* other cabin attendants," App. 166a, and the Cabin Service Manual actually established a chain of command in which pursers were always in charge of basic cabin attendants, male or female, App. 208a. During the 1964 contract negotiations—one year after enactment of the Equal Pay Act—plaintiffs' union requested a review of the contractual definition of the purser position. After that review, the union negotiators who presented a proposed pact to the membership described it as providing a "more accurate description of a flight purser's responsibilities." *Laffey I* J.A. 2563. That "more accurate definition" carried forward the unique reference to pursers' supervisory status.

stewardess were *in fact* different." App. 253a (original emphasis).

The snippets that plaintiffs have selected from the record do not contradict the district court's basic findings that Northwest officials actually assessed the jobs and genuinely concluded that pursers were performing a different job meriting higher pay. In the absence of any findings supporting their position, plaintiffs simply quote the district court's *conclusion of law*, which does no more than track the words of the statute and cursorily conclude that Northwest's wage scale "discriminated on the basis of sex. . . ." App. 217a. The issue now, however, is whether, in light of *County of Washington v. Gunther*, 452 U.S. 161 (1982), that legal conclusion can stand in the face of the facts as found.

Plaintiffs next fall back on statements by the court of appeals in *Laffey I* that *it* drew a "reasonable inference"—even though the trial court had not—that "maleness" was the reason for the pay differential. App. 96a. As this Court has clearly established, however, appellate courts may not arrogate to themselves the fact-finding responsibility of the trial courts. Discriminatory intent

> "is a finding of fact to be made by the trial court . . . [and] means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive." *Pullman-Standard v. Swint*, *supra*, 456 U.S. at 289-90.

This Court, therefore, must look to the trial court's findings, which show that Northwest did not intend to pay pursers less than basic cabin attendants because pursers were men.

Plaintiffs ultimately are left with one passing remark by the trial judge during an oral argument. In context, the remark only referred to Northwest's promotional policy, not the Company's motivation in establishing the pay differential. Moreover, at that same hearing plaintiffs' counsel had conceded that the judge had found the pay differential to be motivated by a factor other than sex:

> "Your Honor found reasonable grounds because your Honor believed, and obviously still believes, that *they sincerely thought that as a matter of fact these jobs were different*; that that was a sincere belief on their part and it was a real belief on their part that there was a difference in fact between these jobs." R. 69 at 40 (emphasis added).

Indeed, in the very passage quoted by plaintiffs here (Opp. at 14), their counsel conceded that the judge had found that Northwest "didn't deliberately intend to violate the Equal Pay Act." The trial judge concurred with these acknowledgements, but concluded that, in his view, his finding of non-discriminatory motive was irrelevant to the issue of liability: "what all of them thought doesn't keep it from being illegal." *Id.* at 105. Under *Gunther*, though, this conclusion was wrong as a matter of law.

3. **The Meaning of *Gunther*.** Plaintiffs merely quote the view of the court in *Laffey III* that, under *Gunther*, actual intent to discriminate against women in setting wage rates is not required when there was an intent to exclude women from promotional opportunities and there is a judicial determination that the higher rated job is substantially equal to the lower paid one. But whether the court of appeals correctly interpreted the elements of an equal pay claim under *Gunther* is precisely the legal issue presented by the petition.

4. **Significance of "Mistake of Fact."** Plaintiffs erroneously assert that a "mistake of fact" about job content cannot be a "factor other than sex" that excuses a wage differential. An employer's good faith assessment of job content, however, is the kind of job-related factor mentioned in the legislative history quoted by plaintiffs (Opp. at 17). All of those factors involve a "mistake of fact" since they are all defenses to—and thus presuppose—a finding that the jobs are *legally* equal. In each case, the employer is nevertheless deemed not to have discriminated on the basis of sex if he relied, mistakenly in a court's view, on its assessment that a job-related factor—such as "lifting or moving" or "hours of work"—made one job different from

another, or one employee more valuable than another. For example, the court of appeals and the plaintiffs recognize that a "job evaluation system" is a "factor other than sex." But reliance on a job evaluation as an affirmative defense presupposes that a court has found that the jobs are legally equal; thus, by definition, the system was "mistaken" in rating them as different. Northwest's allegedly mistaken assessment of the job differences, therefore, is legally indistinguishable from the other kinds of "factors other than sex" that plaintiffs admit are sufficient.

The supposed distinction between "objective" and "subjective" factors drawn by the court of appeals is an artificial construct. In concluding that the jobs were different, Northwest relied on factors such as the differences in defined responsibilities of the jobs, the differing rates negotiated by a single union as appropriate for pursers and basic cabin attendants, and the Company's actual internal assessment of job content.[3] These are just as "objective" as the other factors listed in the legislative history, such as "differences based on experience." Of course, in any situation the employer must make an assessment whether jobs with some degree of similarity merit different pay. That assessment is "subjective" in the sense that it requires the exercise of judgment, but as this Court ruled in *Corning Glass*, even if a court later concludes that the employer's assessment was wrong, the court cannot second-guess him based on its own "objective" view. It is enough under the Equal Pay Act's fourth defense if the employer's decision actually was based on his assessment of job-related factors that, in the employer's *bona fide* judgment, distinguish the jobs.

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[3] Plaintiffs misstate the record when they assert that the differential was not established in collective bargaining. Opp. at 8 n.10. The district court found: "The compensation for all cabin attendants is established through collective bargaining." App. 215a; *see also* App. 166a-167a. That differential was maintained and even widened during 25 years of collective bargaining with unions in which "females always have and still do possess a clear numerical superiority. . . ." App. 165a.

5. **Conflict in the Circuits.** Finally, plaintiffs argue that there is no circuit conflict because the Fifth and Tenth Circuit cases cited by Northwest involve "objective" factors other than sex, not "subjective" "mistakes of fact." But the "objective"/"subjective" distinction is nowhere to be found in those cases. Those cases expressly view motive as the crucial consideration, while the D.C. Circuit and the Ninth Circuit view motive as irrelevant. Plaintiffs, moreover, do not deny that the commentators unanimously have interpreted *Gunther* to mean that discriminatory intent is the ultimate issue in equal pay cases. *See* Petition at 12 n.2.

II. MEASURE OF BACKPAY UNDER TITLE VII

Northwest's original position was that, as a matter of discretion, no backpay at all should be awarded in this case. The district court rejected that position, but in its 1974 order expressly left to a subsequent stage of the litigation the actual determination of the class members' entitlements to backpay. App. 232a. After the remand following *Laffey I*, the remedial phase of the litigation began. Promptly at that stage, and within a few months after this Court decided *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), Northwest raised the measure-of-backpay issue. Under *Manhart* and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the courts below had a duty at least to consider Northwest's equitable proposal for crafting a "make-whole-but-not-more-than-whole" remedy. This they refused to do.

Northwest tendered evidence in support of its Title VII backpay argument more than four years before the district court actually made specific backpay awards in 1982. During that period the parties undertook substantial discovery and made a voluminous evidentiary record in connection with a host of other remedial issues, such as liquidated damages, weight-related terminations and suspensions, pre-judgment interest, and class membership. Thus, the plaintiffs had ample opportunity to test Northwest's evidence; indeed, Northwest invited an evidentiary

hearing in 1978 for that very purpose, but plaintiffs and the district court declined. Plaintiffs have no basis, therefore, for claiming that they were "in fact prejudiced" by the timing of this issue. *Albemarle*, 422 U.S. at 424.

Finally, although plaintiffs now contend that the district court exercised discretion in setting the Title VII backpay formula, they persuaded both courts below to hold that Northwest's view of the proper measure of damages under Title VII was erroneous as a matter of law. The district court stated unequivocally that Title VII *requires* the same backpay formula as the Equal Pay Act when an employer's conduct gives rise to claims under both statutes, and the court of appeals affirmed. App. 248a, 30a-33a; *see also* App. 239a, 133a. Since the courts rejected Northwest's position on the merits, and since this Court in *Gunther* recognized in the interim that the statutes have different remedial schemes and backpay remedies, *see* 452 U.S. at 175 n.14, there is no genuine issue of "waiver" here.

III. PROPER TEST FOR "WILLFUL VIOLATION"

Plaintiffs argue that the interpretation of "willful violation" at issue here has no relationship to the interpretation of the same term in *TWA v. Thurston*, No. 83-997. They base that assertion on the dubious but irrelevant proposition that § 255 of the FLSA, governing entitlement to a third year of backpay, is "compensatory," while § 626(b) of the ADEA governing liquidated damages is "punitive." Opp. at 26. The real point, however, is that § 626(e)(1) of the ADEA expressly incorporates § 255 of the FLSA to govern the backpay period under the ADEA, and all parties in *Thurston* recognize that the term "willful violation" must mean the same thing in both sections of the ADEA. In turn, the incorporated FLSA provision must have the same meaning as the ADEA provisions. Thus, as explained in our petition (at 20-22), these three statutory provisions are inextricably intertwined.

Plaintiffs also deny that there is a conflict among the circuits, even though *Laffey I* itself recognized that dif-

ferent circuits have adopted different formulations of the test, and even though the Sixth Circuit—contrary to plaintiffs' suggestion (Opp. at 24 n.21)—continues to apply a higher standard. *E.g., Donovan v. KFC National Management Co.*, 682 F.2d 603 (6th Cir. 1982); *Marshall v. Root's Restaurant, Inc.*, 667 F.2d 559 (6th Cir. 1982). Moreover, plaintiffs parse only cases decided under § 255 of the FLSA. Undeniably, however, the courts of appeals in cases arising under the ADEA have adopted inconsistent interpretations of the term "willful violation" as used in both the backpay period and liquidated damages provisions, and some circuits have specifically adopted the "intentional violation" standard advocated by Northwest in this case. Petition at 20-21. Thus, there is an undisputed conflict over the standard for "willful violation" between the cases cited by plaintiffs under § 255 of the FLSA, and cases under the ADEA interpreting the same term in a context in which Congress must have intended it to have the same meaning. There is surely enough confusion about this pervasively important issue to warrant definitive treatment in this case.[4]

IV. STANDARD FOR "LIQUIDATED DAMAGES"

Plaintiffs do not deny that, in conflict with every other court that has addressed these factors, the court below ruled that traditional company practice, general industry practice, collective bargaining, and employee acquiescence

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[4] Plaintiffs argue that *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1978), sets forth the "accepted formula" for determining willfulness under the FLSA. Opp. at 23 n.21. Yet, they ignore the fact that *Jiffy June* was a complete departure from all previous decisions under § 255, which had adopted a "conscious violation" standard, and that a Fifth Circuit panel recently concluded that *Jiffy June* had been wrongly decided. *Hill v. J.C. Penny Co.*, 688 F.2d 370, 376 (5th Cir. 1982) (concurring opinion of Gee & Clark, JJ.). Plaintiffs' also ignore, as did the court below, the only scholarly analysis of the legislative history of § 255, which reached the same conclusion as did Judges Gee and Clark. *See, e.g.*, Note, *Standards of Willfulness Under the Fair Labor Standards Act*, 28 Mich. L. Rev. 626 (1980).

are legally irrelevant to determining whether an employer had "reasonable grounds" for believing that his employment practice "was not in violation" of the law, 29 U.S.C. § 260. Opp. at 28. *See* Petition at 24. Instead, they try to sidestep that issue by arguing that this ruling did not infect the evaluation of Northwest's "good faith," a separate requirement for remitting liquidated damages. Opp. at 29. In fact, however, the lower courts improperly treated those factors as legally irrelevant to either question.

On remand following *Laffey I*, the district judge expressly concluded that the court of appeals had precluded him from considering those four factors in evaluating *either* the reasonableness *or* the good faith of Northwest's belief that its actions were lawful: "The Court of Appeals found that the factors relied on by this Court to support the finding of good faith were inadequate...." App. 252a. Once the district judge concluded that he could not consider Northwest's reliance on these factors in making his assessment, the judge found that the *other* evidence of good faith proffered by Northwest was, standing alone, insufficient to carry the very heavy burden placed on employers by *Laffey I*. Then, in *Laffey III*, the court of appeals approved the district court's approach. App. 46a-51a. Thus, the exclusion of the four factors artificially narrowed the trial judge's inquiry on the "good faith" issue and impermissibly tainted his conclusion. Accordingly, the adverse ruling on "good faith," which was made on remand within the strictures erroneously imposed by *Laffey I*, is hardly an independent obstacle to review.

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Pursuant to Rule 22.6 of the Rules of this Court, petitioner, Northwest Airlines, Inc., submits this supplemental brief in support of its petition for a writ of certiorari in order to discuss this Court's decision in *Trans World Airlines, Inc.* v. *Thurston,* No. 83-997, decided on January 8, 1985. *Thurston* is highly material to two of the four issues presented by Northwest's petition and mandates in favor of granting the petition. Those two issues are: (1) the proper test for determining whether a violation of the Fair Labor Standards Act ("FLSA") is "willful" and thus gives

rise to an exceptional third year of backpay liability, *see* 29 U.S.C. § 255(a); and (2) whether an employer acted in "good faith" and with "reasonable grounds" for believing his conduct did not violate the FLSA and, thus, may be relieved of liquidated damages pursuant to 29 U.S.C. § 260.

I. PROPER TEST FOR "WILLFUL VIOLATION"

In *Thurston,* this Court held that a finding of "willful violation" within the meaning of Section 7(b) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626(b)—which governs the award of double damages under that Act—requires a showing that an employer "'knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" Slip op. at 13-14, *quoting* 713 F.2d at 956. The Court expressly left open the question whether the same standard of "willful violation" necessarily governs Section 6 of the Portal to Portal Act of 1947 ("PPA"), 29 U.S.C. § 255(a), "which is incorporated in both the ADEA [29 U.S.C. § 626(e)] and the FLSA [29 U.S.C. § 255(a)]." Slip op. at 14. Section 6 of the PPA provides a two-year backpay recovery period for most violations, but a three-year period for "willful violations." The question of the meaning of "willful violation" in Section 6 of the PPA is squarely presented by Northwest's petition in *Laffey.*

1. This Court's opinion in *Thurston* confirms the existence of a conflict among the circuits. The Court recognized that the "Courts of Appeals are divided over whether Congress intended the 'willfulness' standard to be identical for determining liquidated

damages and for purposes of the limitations period." Slip op. at 15 n.21. In requiring the application of the "knowing or reckless standard" for determining liquidated damages under Section 7(b) of the ADEA, this Court rejected the "in the picture" standard followed by some courts under Section 6 of the PPA. The standard followed by the court below in *Laffey* is similar to the "in the picture" standard.

If, as Northwest contends (Pet. at 20-21), the conflict should be resolved in favor of an identical standard under the two provisions, the standard applied below in *Laffey* is unquestionably wrong.[1] This Court should grant Northwest's petition to resolve the conflict over whether the identical term in both statutory provisions should have the same meaning. as well as the conflict among the circuits regarding the meaning of "willful violation" under Section 6 of the PPA (*see* Pet. at 19-20).

2. The reasoning of *Thurston* demonstrates that the standard adopted by the court below is erroneous. The most important factor that this Court considered in rejecting the "in the picture" standard was its conclusion that the standard as a practical matter would lead to the imposition of the highest amount of possible damages in almost every case, thereby destroying the two-tiered statutory liability scheme. The Court stated:

> "More importantly, the broad standard proposed by the respondents would result in an award of

[1] As the Court also recognized in *Thurston*, the standard applied below would be inconsistent "with the manner in which this Court has interpreted the term [willful] in other criminal and civil statutes." Slip op. at 14.

> double damages in almost every case. As employers are required to post ADEA notices, it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability. Both the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme. We decline to interpret the liquidated damages provision of ADEA § 7(b) in a manner that frustrates this intent." Slip op. at 15 (footnote omitted).

Section 6 of the PPA also establishes a "two-tiered liability scheme." Under Section 6, the backpay recovery period is limited to two years, *"except"* in a case "arising out of a willful violation." 29 U.S.C. § 255(a) (emphasis added). Only in the exceptional case may the added liability be imposed. Nonetheless, as indicated by a recent survey, the effect of decisions like those of the court below and the Fifth Circuit in *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972), articulating the "in the picture" standard, is to frustrate Congress' intent by making it "virtually impossible" for an employer to show that his violation was not willful. That standard has rendered the two-year backpay period a rare exception, if not a statutory relic. *See* Note, *Standards of Willfulness Under The Fair Labor Standards Act*, 78 Mich. L. Rev. 626, 632 (1980) (courts adopting a broad standard have found violations "willful" in all but one case).

II. STANDARDS FOR "LIQUIDATED DAMAGES"

In *Thurston,* the Court expressly applied the standard of "good faith" and "reasonable grounds" that governs the remission of double damages under Section 11 of the PPA, 29 U.S.C. § 260, in determining whether TWA had acted "willfully" and, hence, was liable for double damages under Section 7(b) of the ADEA, 29 U.S.C. § 626(b). The Court reasoned that "the same concerns are reflected" in the two liquidated damages provisions. Slip op. at 16 n.22. The Court's analysis confirms the need to review the standard adopted by the court below in holding that Northwest is liable for double damages.

1. The Court in *Thurston* held that TWA had not "willfully" violated the ADEA because the "record makes clear that TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA." Slip op. at 16. In reaching this conclusion, this Court relied on evidence that TWA officials "sought legal advice and consulted with the Union" in reviewing its retirement policies in light of amendments to the ADEA. Slip op. at 17. It then adjusted its policies in a manner that it believed, albeit mistakenly, was lawful.

By contrast, the appellate court in this case reversed the district court, which had relied on several factors, including Northwest's collective bargaining history, in initially finding that Northwest had reasonably and in good faith concluded that it was in compliance with the Equal Pay Act. The court below held that such factors were legally irrelevant, and instead focused exclusively on the existence of "legal unceratinty."

This Court's own reliance in *Thurston* on such factors as consultation with the union conclusively demonstrates that the court of appeals improperly restricted the liquidated damages issue to the existence of "legal uncertainty." Indeed, in *Thurston* this Court nowhere suggested that "legal uncertainty" must have been the basis for the employer's mistaken conclusion, as *Laffey* held; to the contrary, this Court observed that "the parties . . . simply overlooked the challenged aspect" of TWA's policy. Slip op. at 17. The analysis in *Laffey* cannot stand in light of *Thurston*.

2. *Thurston* also compels the conclusion that the trial court in this case correctly decided in 1974 not to award liquidated damages and that additional evidence submitted by Northwest on remand supported that conclusion.

In holding that TWA had acted reasonably and in good faith, this Court relied on the fact that TWA officials "met with their lawyers to determine whether the mandatory retirement policy violated the Act." Slip op. at 16. Those officials, after consultation with the pilots' union, then reached a conclusion as to the Act's requirements. While this Court held that those conclusions were erroneous, the Court found no basis to believe that TWA was acting unreasonably or in bad faith, given its efforts to comply. The Court considered it critical that "[t]here [was] no indication that TWA was ever advised by counsel that its new transfer policy discriminated against captains on the basis of age." Slip op. at 17. Indeed, the Court found that TWA had acted reasonably and in good faith despite the fact that the union *opposed* the policy.

The record in this case presents an even clearer case. The trial court in *Laffey* found that Northwest officials met with Northwest's labor relations counsel to review the pay differential between pursers and stewardesses in light of the Equal Pay Act and Title VII after the enactment of those statutes and "concluded that the jobs of purser and stewardess were *in fact* different." App. 253a (emphasis in original). In its initial decision not to award liquidated damages, the trial court also found that Northwest officials had relied on several factors in reaching their belief that they were not violating the law, such as the long-established practice of the company, which reflected the results of 25 years of collective bargaining with the stewardess-dominated labor union. Indeed, unlike *Thurston,* where there had been union opposition to the challenged practice, in *Laffey* there were no complaints or even suggestions from stewardesses or their union that the pay differential was improper.

Thus, as in *Thurston,* the record below demonstrates that Northwest officials, like TWA officials, recognized the need to consider the impact of the new law on its policies, considered those policies with the aid of counsel and in light of the position of the employees' union, and concluded that its policies were lawful. The trial court initially concluded that Northwest in fact believed that it was in compliance with the Equal Pay Act and that "it was not unreasonable" for it to do so. App. 220a.

The analysis in *Thurston* ineluctably leads to the conclusion that Northwest acted reasonably and in good faith, and that the court of appeals improperly restricted the trial court's consideration of factors

other than "legal uncertainty." Northwest's petition should be granted to bring the law in the D.C. Circuit into line with this Court's decision in *Thurston*.

CONCLUSION

The petition for a writ of certiorari should be granted to consider the two issues discussed above and the other two issues presented by the petition.

Respectfully submitted,

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